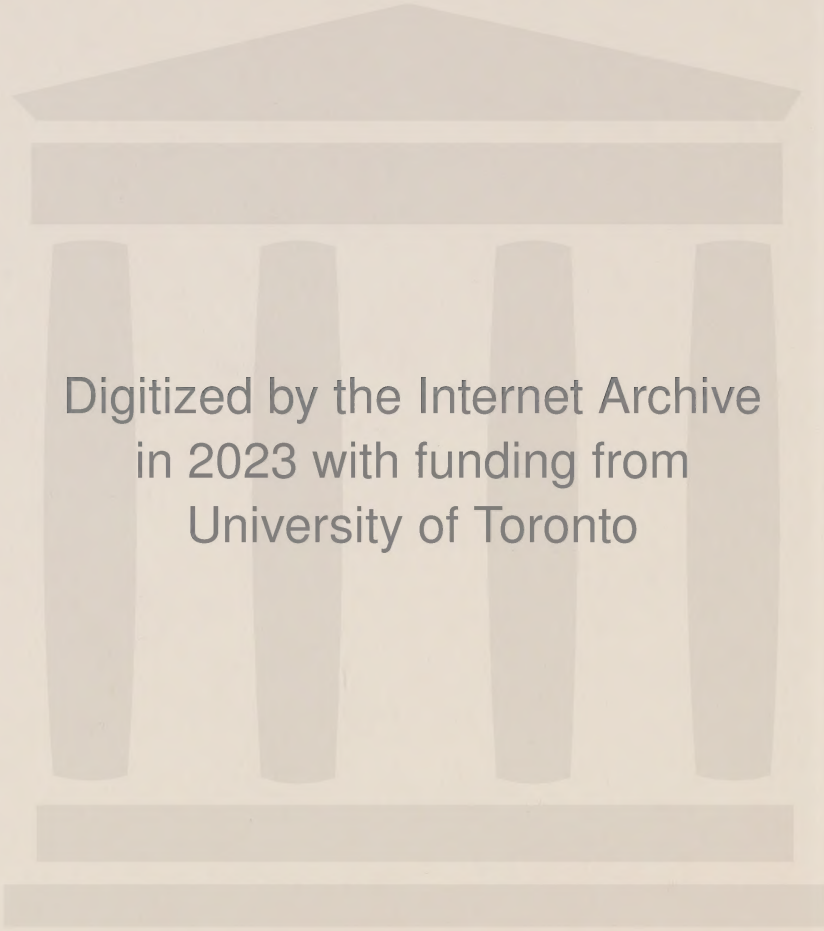

Charities: The Legal Framework

Neil Brooks
for
Policy Coordination Directorate
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This background paper is a thorough examination of various legal aspects of the framework of charities in relation with the Income Tax Act. The author of this study, Neil Brooks, is solely responsible for its contents and the opinions expressed are not necessarily those of Secretary of State Department.

(The English text is the original version)

Texte français disponible

BACKGROUND PAPER:

CHARITIES: THE LEGAL FRAMEWORK

This paper is divided into four chapters. Each chapter reviews, respectively, legal and policy background material for four issues related to the legal framework of charities:

1 **Definition of Registered Charity.** Whether the definition of charitable activities for the purposes of the Income Tax Act[1] should be codified or revised or both?

2 **Charities and Political Activities.** Whether, and if so the extent to which, charities registered under the Income Tax Act[1] should be allowed to engage in political activities?

3 **Citizen Interest Groups.** Whether if charities are to be prohibited from engaging in an unlimited amount of political activities, a separate class of non-profit organizations, perhaps called citizen interest groups, ought to be recognized for tax purposes and a special tax concession extended to contributors to such organizations?

4 **Procedures for Registered Charities.** Whether the present procedures under the Income Tax Act for registered organizations as charities and for appealing the decisions of Revenue Canada on this and related questions should be revised?

INTRODUCTION

This introduction reviews a number of preliminary matters about the paper and the issues discussed. They are numbered only for the sake of clarity: (1) Form; (2) Related Issues; (3) Relevance; (4) Significance; and (5) Use of the Term "charity"

1 Form

The sole purpose of the paper is to provide background legal and policy materials relating to the issues presented. Hence, generally no conclusions on the substantive issues are stated, and contentious evaluations are avoided as much as possible. The information is presented in a descriptive, but analytical, manner. Of course, value judgments permeate all writing, even informative writing. Therefore, to keep the paper as objective as possible value judgments are identified when they are significant.

Since it is intended to serve as a background paper and perhaps a source for reference, the paper reviews most of the literature relating to the issues covered and reproduces particularly relevant materials. Although this gives the paper considerable bulk, hopefully the convenience of having the material collected in one place compensates for this quality of the paper.

2 Related Issues

A number of issues relating to the role of the voluntary sector are currently under study by the government. Two of these issues are closely related to the questions examined in this paper.

One related issue involves the tax incentive for charitable giving by individuals. At present, taxpayers are able to deduct from their taxable income, within certain limits, all contributions they make to registered charities.[2] Concern has been expressed that this tax incentive is both inefficient and inequitable. Various forms of tax credits and direct matching grant schemes have been suggested as replacements.[3] This issue is at present under study by the Department of Finance. However, the issues discussed in this paper can be resolved without reference to the precise tax deduction or credit that is granted to, or direct matching grant scheme used in respect of, contributions to charities.

A second related issue involves the tax rules that regulate various aspects of the operation of charitable organizations. Section 149.1 [4] of the Income Tax Act contains a number of detailed rules that regulate such matters as how much of their income these organizations must disburse every year, what related business they can carry on, what dealings they can have with non-arms length persons, and what information they must report annually to Revenue Canada.[5] Many of these rules were reviewed by the Department of Finance less than 10 years ago. The Department published a discussion paper entitled "The Tax Treatment of Charities" in June, 1975.[6] Extensive consultations were held with representatives of the voluntary sector. On the basis of this study and consultation process, the budget of May 25, 1976 proposed several changes to these rules. The majority of these proposed amendments were passed and became effective as of January 1, 1977. In view of the experience with these amendments, further amendments were proposed in the November 11, 1981 budget. These amendments provoked considerable controversy and their implementation was subsequently postponed to enable the Department of Finance to continue to consult with organizations in the voluntary sector with respect to the problems which the proposed rules addressed and the alternative solutions. In the April, 1983 budget the government issued a discussion paper and draft legislation relating to these issues.[7] Following further consultation with the voluntary sector the government will introduce amending legislation.

Again, the issues dealt with in this background paper can be dealt with independent of the rules in the Income Tax Act relating to the regulation of registered charities. In deciding whether an organization should be defined as charitable the essential question is whether the organization should be tax exempt, and whether taxpayers who make gifts to it should be allowed some form of tax savings or have their gift automatically matched by the government in some way. The detailed rules in section 149.1 are largely irrelevant to this issue.

3 Relevance

As will be reviewed in some detail below, over the last number of years all four issues addressed in this paper have been exhaustively examined in both the U.K. and the U.S. In Canada, they are of current interest to many groups and individuals. In his June 18th, 1971 budget speech, in which he tabled Bill C-259, which subsequently became referred to as the "Tax Reform Act of 1972," the Honourable E.J. Benson stated that although the Bill did not contain any tax changes

relating to charities, the government was undertaking a re-examination of the relevant provisions "... to determine whether the traditional definition of charitable organizations is broad enough to reflect real needs in the 1970s."[8] An interdepartmental committee was organized to consider this issue. However, for various reasons, this study was never completed. Instead, the Department of Finance devoted its resources in this area to producing a discussion paper which dealt with the regulations relating to the operation of registered charities, which was referred to above.[9] That discussion paper did not contain a discussion of the issues addressed here.

In 1974, the Secretary of State, the Honourable Hugh Faulkner, appointed a "National Advisory Council on Voluntarism" to study generally the problems and potentials of the "voluntary sector." Its comprehensive report, People in Action, released in 1977,[10] included a brief discussion on and recommendations relating to the issues addressed here. The report will be referred to where relevant throughout this background paper.

In 1978 the Coalition of National Voluntary Organizations, a coalition of over 100 national voluntary organizations, began studying these issues and lobbying for changes.[11] Various government ministers over the past few years, in part responding to the concerns raised by the National Voluntary Organizations, have given commitments that the issues would be studied.[12] Also, in 1978, after Revenue Canada issued an Information Circular relating to the political activities of charities that was subsequently withdrawn after a storm of protests, numerous government ministers stated that the issues would be reviewed.[13]

4 Significance of the Issues

Many aspects of the issues discussed in this paper do not raise revenue consequences. Whether the definition of charity should be codified. Whether charities should be entitled to engage in a limited amount of political activities, and whether the process of registering charities should be changed, for example, are questions the resolution of which probably do not involve significant revenue consequences. Their resolution involves a complex set of legal and other interests, which are discussed below.

However, if the definition of registered charity is to be expanded then there are clearly revenue consequences. What is at stake in resolving such a question is whether particular organizations should be entitled to receive

contributions that the donor can deduct from taxable income. The income of virtually all non-profit corporations is exempt from tax;[14] however, taxpayers are only entitled to deduct the value of gifts that they make to registered charities and a small number of other specifically mentioned organizations.[15]

5 Use of the Term "Charity"

There is considerable looseness in language in referring to charities and charitable organizations. At common law, since the definition of charity most frequently arises in trust law, the issue before the court is normally whether a particular trust has charitable purposes. So in this context the question of the definition of charity is more accurately a question of what purposes are charitable. In tax law, the issue is normally whether an organization applying for registration under the Income Tax Act is charitable; that is, whether the organization has charitable objects. An organization for this purpose might be an unincorporated association, a trust, or a not-for-profit or non-share-capital corporation.[16] The Income Tax Act refers to "registered charities,"[17] which in turn are defined as meaning "charitable organizations" and charitable foundations." They in turn are defined, respectively, as meaning, in part, "a corporation or trust constituted and operated exclusively for charitable purposes" and "an organization, whether or not incorporated all the resources of which are devoted to charitable activities." These definitions are reviewed in detail below.[18] In this paper the use of the terms charity, charitable purposes or objects, charitable activities, and charitable organizations or trusts is dictated solely by the grammatical context. They are all used in virtually the same legal sense.[19]

CHAPTER 1 DEFINITION OF REGISTERED CHARITY

PART III CODIFYING AND REFORMING THE DEFINITION OF CHARITY

A Should the Definition of Charity be Codified?
- 1 View of Judges and Commentators
- 2 Factors to be Considered
  - a Flexibility and Changeability
  - b Predictability
  - c Accessibility
  - d Need for Unique Definition

B Reforming the Definition of Charity

C Drafting a Definition of Charity
- 1 Detailed Rules or General Principles
- 2 Courts or Specialized Tribunals

D Illustrations of Attempts at Codification

APPENDIX
1. National Voluntary Organizations
2. Brungate
3. American Law Institute
4. Goodman Report
5. Keeton and Sheridan
6. U.S., International Revenue Code, Regulations
7. Australia, Income Tax Assesment Act
8. Briefs of Canadian cases.

CHAPTER 1 DEFINITION OF REGISTERED CHARITY

INTRODUCTION

The Income Tax Act does not contain a substantive definition of charity. In determining whether an organization is entitled to register under the Act as a charity, resort must be made to the common law concept of charity. At common law the concept of charity has been the subject of countless cases. These cases normally arise in the context of trust law.

From time to time over the last 100 years the suggestion has been made in England, and more recently in Canada, that the common law concept of charity should be codified for tax purposes. A number of criticisms have been made of the common law concept: it has not and cannot evolve to take account of changing social needs; its application is unpredictable; it is inaccessible; and it has been distorted since the same concept must apply in a number of different areas of the law.

In providing background information relating to the question of whether the common law should be codified for tax purposes, this chapter of the paper is divided into three main parts. Part I reviews the history, development and the present law in relation to the concept of charity. The historical roots of the concept are deep and pervasive. Even a superficial understanding of the present law requires an appreciation of the origin of the concept. Obviously, as well, a clear understanding of the present law and the method by which is has developed is necessary before it can be fairly criticized and a prediction made about how it will evolve in the future in the absence of legislative intervention.

Part II of this chapter reviews the recommendations of various reports in the U.K. that over the last 60 years have dealt with the issue of whether the concept of charity should be codified for tax purposes. In addition to providing an important context for consideration of the issue, this review reveals some of the recurrent criticisms of the common law concept, but at the same time some of the difficulties of codification. Most of these reports concluded generally that a statutory definition would not be an improvement over the common law. The common law concept is still applied in U.K. tax cases.

Part III reviews a number of factors and criteria to be considered in addressing the issue of codification. Often two distinct questions are subsumed within the single question, should the concept of charity be codified? First, whether the common law definition should be restated in legislative form, and if so, how? This question involves largely issues of legal process. The second question often implicit in the more general question is whether the present definition of charity should be restricted or expanded generally or whether it should be changed in some particular respects? This question obviously raises more fundamental

public policy and political issues. Each of these two questions are dealt with. However, because of the predominantly political nature of the second question, most of the discussion relates to the more narrow legal interests that must be considered in answering the first question.

PART I HISTORY, DEVELOPMENT AND PRESENT LAW

A Relevant Income Tax Act Provisions

The Income Tax Act does not contain a substantive definition of those non-profit organizations that can register under the Act as charities. "Charity" is simply defined as meaning "a charitable organization or charitable foundation."[20] A "registered charity" is defined basically as a charitable organization or charitable foundation that has been registered under the Act.[21] Thus, these definitions do little more than indicate that in order for an organization to be treated as a charity under the Act it must be registered, and that for the purposes of the Act charities are divided into two broad categories. These two categories of charities are in turn only identified in broad terms.

A "charitable organization" is defined as "an organization ... all the resources of which are devoted to charitable activities ... and no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee, or settlor thereof."[22] Charitable organizations include all the familiar charitable associations in the voluntary sector that are actually engaged in providing specific public goods and services in the fields of arts and culture, education, social welfare and health. "Charitable foundations" are less well known to the Canadian public. They are defined as "a corporation or trust constituted and operated exclusively for charitable purposes ... and that is not a charitable organization."[23] Although not apparent from this definition, subsequent definitions including the definition of "charitable purposes," makes it clear that charitable foundations are corporations or trusts which are operated for the purpose of disbursing funds to charitable organizations.[24] Thus they are essentially repositories of capital funds the income from which is distributed every year to organizations that are actively engaged in directly providing public services.

Neither of the key phrases in these definitions, "charitable activities" or "charitable purposes" are defined substantively in the Act.[25] Thus it is left to the courts to give these phrases meaning. They have done so by turning to the common law definition of charitable purposes which was developed largely in the area of trust law. Even at common law there is no encapsule definition of what is a charity. Instead, in determining whether the purposes of a particular trust are charitable the courts normally apply four tests. To be held charitable the purposes of a trust must pass each of these tests: (1) Do the purposes of the trust fit within the classification of charitable purposes set forth by Lord Macnaughten in what is now widely referred to, and will be referred to throughout this paper, as Pemsel's case? In that case Lord Macnaughten asserted that all charitable purposes could be categorized as for the relief of poverty, the advancement of education, the advancement of religion, or other purposes beneficial to the community.[26] (2) Are the purposes of the trust for the

benefit of the public? (3) Are the purposes of the trust analogous to the purposes listed in the preamble to the Statute of Uses, 1601, or to purposes which have been held by the courts to be analogous to these purposes? (4) Are the purposes legal and not a violation of public policy?

This common law definition of charitable purposes will be elaborated on in some detail below. Here the history of the Canada tax provisions relating to charities will be briefly reviewed. This review reveals that although there was some initial confusion about the intended scope of these sections, as amended, their intent was clearly to incorporate the English common law jurisprudence relating to the definition of charity.

The income of charities has been exempt from tax in Canada since the enactment of the first federal income tax statute, in 1917. However, the deduction for donations to charitable organizations was not enacted until 1930.

Subsection 5(d) of the Income War Tax Act,[27] 1917 provided that "The following incomes shall not be liable to taxation ... the income of any religious, charitable, agricultural and educational institutions." The meaning of the term "charitable" in this subsection is unclear. Two well-informed, contemporary commentators noted that as used in this section the words "charitable institution" probably meant "relief of poverty, since the other three meanings of the word (given in Pemsel's case) have been otherwise specifically dealt with in the section."[28] However, although religious and educational institutions were specifically mentioned in the section, institutions pursuing "other purposes beneficial to the community," the fourth category in Lord Macnaughten's classification in Pemsel's case, was not mentioned. Consequently, under this interpretation of the section, a large number of organizations that would be charitable at common law would not be exempt from tax under this subsection. However, presumably this more restricted meaning of charity did not create any difficulties because even though not defined as charitable under the Act, organizations that fell within Lord Macnaughten's fourth category would likely have been exempt from tax under one of the other subsections of section 5. For example, subsection 5(g) provided for the exemption of "income of clubs and associations organized and operated solely for social welfare, civic improvement, pleasure, recreation or other non-profitable purposes, no part of the income of which inures to the benefit of any stockholder or member."[29]

The wording of the subsection remained essentially unchanged until 1948. In that year the words "religious, charitable, agricultural and educational institutions" were removed and the phrase "charitable organization" alone was substituted.[30] This change was clearly intended to ensure that all organizations that were charitable at common law were embraced within the definition. As explained below, beginning in 1930 the term "charitable organization" was being used in the Act to refer to the common law concept of charity.

When a tax deduction for donations to charities was first proposed in 1930, it was restricted to donations to a relatively narrow range of organizations. In that year the government proposed to add to the Income War Tax Act a provision "That, donations, to the extent of 10 per centum of the net income of the taxpayer to any church, university, college, school or hospital in Canada, be allowed as a deduction."[31] The opposition members demanded in the clause by clause debate that the deduction be broadened to cover donations to community funds and other similar charities.[32] The Minister of Finance, the Honourable Charles A. Dunning, resisted an expansion of the deduction largely on administrative grounds. He suggested that once experience was gained with the deduction, consideration would be given to expanding it.[33] However, later in the debate the Minister moved to amend the section by striking out the words "any church, university, college, school or hospital" and substituting therefore the words "any charitable organization."[34] He went on to explain that this phrase would embrace all organizations that were at common law regarded as charitable. He quoted from Halsbury's Laws of England to give an indication of the broad scope of the phrase.[35] Mr. Bennett, sitting in 1930 as an opposition member, stated that he was "satisfied that the term 'charitable organizations' covers every species of benevolence that any citizen of Canada may desire to indulge in."[36]

B Common Law Development of the Concept of Charity[37]

The most frequent charge made against the common law definition of charity is that it is antiquated. Proof of this charge is assumed to lie in that even today in determining whether a particular purpose is charitable the courts frequently refer to a list of charitable purposes contained in an English statute passed in 1601. Thus an evaluation of the common law methodology used in defining a charity must begin with an examination of the Statute of Uses, 1601, or the Statute of Elizabeth I, as it is often referred to.

Prior to the 1600s there was little need in English law to develop a concept of charity. The church, the manor, and the guilds undertook most of the social welfare work. Individuals who desired to make gifts or bequests for what would now be considered charitable purposes, most significantly the relief of poverty, frequently did so by making them to the church, which in turn would administer the funds for the purposes requested by the donor. The ecclesiastical courts supervised the administration of such funds.

However, as these three medieval institutions declined in importance, merchants and the landed gentry began assuming a larger role in funding social welfare institutions. Uses or trusts were the legal device by which much of this funding was secured. A philanthropic donor would, normally by will, leave a gift to the church or to some other person, with a direction that it be applied for a particular charitable purpose.

Eventually, at some time prior to 1600, the Court of Chancery assumed jurisdiction from the ecclesiastical courts in enforcing these uses. It was natural that the King as parens patriae, through the Chancellor, would assume responsibility for supervising these funds devoted to the public benefit. To the extent it can be determined, it appears that before 1601 the Court of Chancery in deciding whether a use was charitable simply asked whether it was or was not for the public benefit that property should be devoted forever to fulfilling the purpose named.[38] In deciding this they considered relevant legislative enactments that might reflect public policy and general principles.

Even though the Chancery Court was prepared to recognize and enforce charitable uses, since no particular person suffered directly if the funds were misapplied, few actions for enforcement were brought. Also a court action to enforce such uses could be time-consuming and expensive. A significant amount of the funds held for charitable uses were thus apparently misapplied.

In the late 1500s the Tudor state become increasingly concerned about the growing problems of poverty and vagrancy. Agrarian reorganization and manufacturing development with its cycles of employment were creating a large class of often destitute laborers and vagrants. From 1597 to 1601 the well known Elizabethan poor laws were passed by Parliament. They systematized earlier regulations and placed responsibility for the relief of poverty primarily upon local officials. Local communities were given power to levy and collect taxes for this purpose. Coincident with the introduction of this legislation the flow of private charitable funds designed to assist the poor increased quite dramatically. It was largely to encourage this private philanthropy and ensure that donated funds were being used for their intended purpose that the Statute of Uses 1601 was passed. It was entitled, "An Act to redress Misemployment of Lands Goods and Stocks of Money heretofore given to certain Charitable Uses."

The Act established administrative machinery to supervise the administration of charitable uses. It thus provided a remedy of an information brought by a private individual in the Court of Chancery. The machinery took the form of ad hoc local commissions appointed by the Chancellor that could on their own initiative inquire into the existence of charitable donations and inquire into "any breach of trust, falsity, non-employment, concealment, misgovernment or conversion" of trust money.

Obviously, the appointed local commissioners needed guidance as to the types of uses they should be inquiring into. Thus the preamble to the statute listed a number of representative trusts. The preamble, restated in modern English and with the specific uses enumerated for ease of reading, provided as follows:[39]

> Whereas lands ... goods ... chattels ... and money, have been ... given ... by sundry ... well-disposed persons ... for ...

> The relief of aged, impotent and poor people;
> The maintenance of sick and maimed soldiers and mariners;
> The maintenance of schools of learning, free scholars in universities;
> The repair of bridges, ports, havens, causeways, churches, sea banks and highways;
> The education and preferment of orphans;
> The relief, stock or maintenance of houses of correction;
> The marriage of poor maids;
> The supportation, aid and help of young tradesmen, handicraftsmen and persons decayed;
> The relief of redemption of prisoners or captives;
> The aid or ease of any poor inhabitants concerning payment of fifteens, setting out of solders and other taxes.
>
> which lands ... goods ... chattels ... and money, nevertheless have not been employed according to the charitable content of the givers ... by reason of frauds, breaches of trust and negligence in those that should ... employ the same:

In its historical context, it is clear that the preamble to the Statute of Uses, 1601 was not intended to be a definition of charitable purposes. It was an integral part of the Tudor states attempt to deal with the serious problems of poverty and vagrancy.[40] At most, the preamble was a listing of those uses that might assist in relieving poverty and combatting the social evils of vagrancy and thus reduce the local communities' financial responsibilities to take care of the poor and vagrants. Even for this purpose the preamble was not regarded at the time as being an exhaustive listing.

The procedures established by the Statute of Uses, 1601 were successful at first. However, because they were cumbersome they fell into disuse after 30 or 40 years. Once again the enforcement of charitable trusts rested with private individuals laying informations (in the name of the Attorney-General) in the Chancery Court. Few such actions were brought. Thus for the next 150 years there were very few cases dealing with the definition of charity. In the late 1700s the number of cases began to increase. The Mortmain and Charitable Uses Act, which was passed in 1736, prohibited in most cases the transfer of land to charities. The question of whether a trust was charitable could arise in this context. Also the number of cases brought by potential heirs to have testamentary trusts set aside on the grounds that the objects were uncertain increased. If the trusts had charitable purposes neither of these conditions for a valid trust applied to it.

Even after the enactment of the Statute of Uses, 1601, in cases not involving the statute but in which the definition of charity was in issue the Courts determined the issue largely by asking whether the purpose was for the public benefit. However,

in part, because the preamble to the Statute of Uses, 1601 provided such a convenient listing of purposes that were obviously charitable, and because many judges were anxious to restrict the definition of charity,[41] the courts began the practice of referring to the preamble either directly or by analogy in holding that a particular purpose was or was not charitable. Eventually this practice developed into a rule of law - only purposes referred to in the preamble of the Statute of Uses, 1601 or purposes analogous thereto could be held to be charitable. The leading case, which was decided in 1805, is Morice v. Bishop of Durham.[42]

Since the case had such a significant impact on the law relating to the definition of charity, it will be reviewed here in some detail. The case involved a will in which the testatrix had bequeathed her residuary personal estate for "such objects of benevolence and liberality as the Bishop of Durham (her executor) in his own discretion shall most approve of." The bequest was challenged by her next of kin. The legal issue was whether the trust was for a charitable purpose. If not, it would fail because its objects were uncertain. Counsel representing the Bishop argued what appeared to be the prevailing view at the time, namely that "upon the authorities almost everything, from which the public derive benefit, may be considered a charity."[43] Indeed in the lower court before the Master of the Rolls none of the Counsel appear to have argued from or even cited the preamble to the Charitable Uses Act, 1601. Sir Samuel Romilly, a leading counsel and later Master of the Rolls, who represented the next of kin, simply argued that "objects of liberality," which were objects for which the money could be applied, were not charitable since they did not "necessarily" (import) any thing of a public nature; from which the public is to derive any benefit."[44] However, in his judgment the Master of the Rolls, Sir William Grant, in rejecting the argument that charity simply means for the public benefit, stated that:

> Do purposes of liberality and benevolence mean the same as objects of charity? That word in its widest sense denotes all the good affections, men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in this Court.
>
> Here its signification is derived chiefly from the statute of Elizabeth (stat. 43 Eliz. c.4). Those purposes are considered charitable, which that Statute enumerates, or which by analogies are deemed within its spirit and intendment; and to some such purpose every bequest to charity generally shall be applied.[45]

On appeal to the Lord Chancellor, Romilly naturally seized upon this more restricted definition of charity in arguing that the trust should be declared void. Perhaps in an attempt to reconcile the more broadly decided cases with this construction he suggested that to be charitable a purpose had to come within one of four categories:

> There are four objects, within one of which all charity, to be administered in this court, must fall. First, relief of the indigent; in various ways: money: provisions: education: medical assistance; etc. Secondly, the advancement of learning: Thirdly, the advancement of religion; and Fourthly, which is the most difficult, the advancement of objects of general public utility.[46]

This classification was not adverted to by the Lord Chancellor in giving his reasons for judgment. However, as discussed below, it was later adopted by Lord Macnaughten in Pemsel's Case, without attribution.[47] Lord Chancellor Elden in holding that the trust was not charitable stated that in law charity was to be restricted to "either such charitable purposes as are expressed in the Statute (stat. 43 Eliz. c.4), or to purposes having analogy to those."[48]

Although a few cases after Morice v. Bishop of Durham appeared to apply a much broader interpretation of charity, gradually it was accepted that, on the basis of this decision, in order for a purpose to be charitable a reference or analogy had to be made to the preamble of the Statute of Uses, 1601.

The restrictive approach taken to the definition of charity in Morice v. Bishop of Durham can probably be explained by the judicial hostility to charity in the late 1700s and 1800s. In part this hostility was undoubtedly caused by the judges' concern that testamentary gifts to charity often deprived the next of kin of what some might have considered their 'rightful due.'[49] But it was also reflective of the judges' sympathy to the more general anti-clerical movement at the time,[50] and the general conservatism of judges.[51] By way of illustration, Dr Gareth Jones notes that the Earl of Northington, a leading judge in the late 1700s, "frequently expressed his happiness that he was in a position to prevent foolish or, as he called, them, superstitious devices to charity."[52]

C Development of the Definition of Charity in English Tax Cases[53]

The first income tax statute in England, passed in 1799, contained an express exemption for the income of any "corporation

fraternity or society of persons established for charitable purposes only."[55] The exemption remained when the statute was substantially revised in 1803.[56] This statute ceased in 1816. However, when the modern English income tax statute was enacted in 1842 the exemption was reintroduced.[57]

Unfortunately, there appears to be little historical evidence as to why "societies of persons established for charitable purposes only" were exempted from income tax in 1799.[58] Therefore, the exact meaning that Parliament intended to be applied to the words remains unknown. Initially the commissioners of Inland Revenue adopted the definition of charity that had developed in trust law. However, it appears that there was some feeling among the commissioners and in the Treasury that a more narrow definition should apply.

The matter received reconsideration by the administrators of the English income tax statute after Gladstone, then Chancellor of the Exchequer, attacked the exemption for charities in 1863. In both his Financial Statement of 1863, and in a long speech in Parliament a few days later, he argued that endowed charities, in particular, should not be entitled to the exemption. Anticipating the arguments that have only recently been made by proponents of the tax expenditure concept, he argued that the exemption forced the state to subsidize in perpetuity societies that qualified as charitable. He was concerned that the subsidy that these organizations received from the state was concealed and unaccompanied by state control.[59] He also pointed out that the wealthy charities with large endowments received a large grant from the state under the tax exemption, but the poorer charities that depended upon annual subscriptions, received little or nothing. Gladstone's arguments did not arouse any support among Parliamentarians.[60] However, bolstered by Gladstone's attack, the commissioners of Inland Revenue began adopting a much more restrictive definition of charity. Gradually, over the next 20 years their administrative practices changed until it would appear that they had taken the position administratively that only organizations engaged in the relief of poverty were charitable. Their administrative position was finally challenged in 1886 when they refused to grant an exemption to a Moravian trust which had previously received it. This challenge lead to what is now regarded as the leading case on the definition of charity, Commissioners for Special Purposes of Income Tax v. (Pemsel's case).[61]

The facts of the case can be briefly stated. In 1813 certain lands were conveyed to trustees on trust to apply the income for the general purpose of establishing and maintaining the missionary establishments among heathen nations of the Protestant Episcopal Church (commonly known as the Moravian Church). The issue before the House of Lords was whether the purpose of this trust were charitable within the meaning to be given to that concept under the income tax legislation.

Basically, the commissioners argued that the concept of charity as used in the income tax legislation should be restricted to its ordinary and popular meaning; namely, the relief of poverty. Pemsel, on the other hand, who was the treasurer of the Moravian Church, argued that even in the context of tax legislation, the word charity ought to be given its technical legal meaning, the meaning that it had acquired in trust law.

In long and ponderous judgements the House of Lords held in favor of Pemsel. Because they are significant in understanding the common law definition of charity, a number of points might be made about the case.

First, the result was not an obvious one. The commissioners' general argument had been accepted three years earlier in a Scottish case, Baird's Trustees v. Lord Advocate.[62] In Pemsel's case itself it was accepted by Lord Coleridge C.J. in the Court of Appeal,[63] and by two judges in the House of Lords who dissented from the majority's opinion, Lord Halsbury and Lord Bramwell. Furthermore, the decision was reached on technical grounds that are not at all compelling.

Second, the judges did not address themselves to the policy issues. However, as a matter of interest, it seems clear that the personal sentiments of the judges were in accord with the decisions they reached. Lord Bramwell, for example, who dissented, stated that:

> As the majority of your Lordships think (that the purposes of the trust are charitable) the state will be a subscriber of £17 a year to supporting, maintaining, and subsidizing "the missionary establishment among heathen nations of the Protestant Episcopal Church known by the name of the Unitas Fratrum, or United Brethren." Whether this was meant by the authors of the Income Tax Act, if it was, why, and whether it will be continued, are questions not before us.[64]

Lord Macnaughten, on the other hand, who wrote the leading majority opinion, was obviously satisfied with the outcome he felt the law compelled him to reach. In particular, he seemed pleased to be able to find against the commissioners who he seemed to think had acted improperly in changing their administrative practice and adopting a more restrictive definition of charity. He noted:

> With the policy of taxing charities I have nothing to do. It may be right, or it may be wrong, but speaking for myself, I am not sorry to be compelled to give my voice for the respondent. To my mind it

> is rather startling to find the established practice of so many years suddenly set aside by the administrative department of their own motion, and after something like an assurance given to Parliament that no change would be made without the interposition of the Legislation.[65]

Thirdly, the real significance of the case, other than its holding that charitable purposes have the same meaning for tax as they do for trust law, is the four-fold classification of charitable purposes enunciated in it by Lord Macnaughten. In the course of giving his reasons for judgment he suggested that:

> "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes benefical to the community, not falling under any of the preceding heads.[66]

He obviously borrowed this classification from Romilly's argument in Morice v. Bishop of Durham,[67] but it does not appear that he attached great significance to it. It is buried in the middle of his judgment, unanalyzed. However, subsequent cases have treated it with more reverence than normally accorded even to legislative enactments.

D Present Law: The Definition of Charities

In the United Kingdom and other Commonwealth countries there have been literally countless decisions on the definition of charity. In textbooks that cover the subject these decisions are usually grouped under three of four dozen headings and subheadings. On the face of it, it would appear that a reported case covering almost every purpose that could conceivably be called charitable could be found. These cases will not be examined here. A complete analysis of the cases can be found in any one of numerous textbooks.[68] Instead, the general principles that underlie these cases will simply be reviewed. However, in order to provide an impression of the kinds of cases that the courts have to deal with and the methodology used by the courts in deciding whether a purpose is charitable all the Canadian cases decided since 1960 have been briefed in "Appendix 8" of this chapter.

At the risk of oversimplifying, it can be said that in order to be held charitable, a purpose must meet four broad tests. No doubt, no two legal scholars would agree on the precise statement of these tests, or even whether one or all of them are truly significant. Also, the formulation of the tests could have been further broken down into more discrete questions or abstracted to a higher level. However, the purpose of reviewing them here is

not to resolve an academic debate or postulate criteria for predicting court decisions in this area. The purpose is to provide a general impression of the common law methodology used by courts in determining whether a particular purpose is charitable. The courts do not necessarily explicitly apply each of the following tests in each case, let alone ask them in the form or follow the order suggested below. However, to the extent one can generalize from the myriad of cases about what the judges are in fact doing, these tests would appear to underlie the common law definition of charity.

1 Pemsel's Case

First, if a purpose is to be held to be charitable it must fall within one of the categories listed by Lord Macnaughten in Pemsel's case in 1891. That is to say, the purpose must be for (a) the relief of poverty, (b) the advancement of education, (c) the advancement of religion or (d) some other purpose beneficial to the community. Courts almost invariably cite Pemsel's case and feel compelled to categorize the disputed purpose according to the list. If the purpose cannot be so categorized then it is held not to be charitable.

One may ask why this task of categorization is significant. Particularly, since the categories are stated disjunctively and the fourth category, "purposes beneficial to the community" could be read to embrace the first three categories. It would appear that the categorization serves two purposes. First, the test discussed next provides that to be charitable a purpose must provide a public benefit. If the purpose falls within one of the first three categories mentioned in Pemsel's case the courts are prepared to assume, in the absence of contrary evidence, that it is for a public benefit. If the purpose falls within the fourth residual category the proponent of the charitable trust has the burden of proving that the purpose is for a public benefit. Thus the categorization serves as a mechanism for allocating the burden of proof on the question of whether the purpose is for the public benefit. The second purpose served by this categorization is that it simplifies judicial reasoning about charitable purposes. Because judges invariably refer to the category under which the particular purpose before them might fall, the process of analogy drawing is simplified. Cases that judges perceive as being similar will be uniformly classified.

It would appear that the courts' adherence to the classification in Pemsel's case has done little to impair the orderly evolution of this branch of the law. Even those courts that construe the list as if it were a legislative enactment have been able to manipulate the words to achieve sensible results. Of course, such manipulation is normally not necessary since the fourth category is so open-ended. More recently, the English House of Lords has even acknowledged that it is primarily a list of convenience. Lord Wilberforce, in the

leading case of Scottish Burial Reform and Cremation Society v. Glasgow Corporation,[69] although acknowledging the value of Lord Macnaughten's classification, put its use in the following perspective:

> But three things may be said about it, which its author would surely not have denied: first that, since it is a classification of convenience, there may well be purposes which do not fit neatly into one of other of the headings; secondly, that the words used must not be given the force of a statute to be construed; and thirdly, that the law of charity is a moving subject which may well have evolved even since 1891.[70]

2 Public Benefit

To be charitable a purpose must confer a tangible benefit on the public. This test has two aspects. First, some social interest must be furthered by the purpose. That is to say, in every case the courts must assume or receive evidence relating to the public benefit to be derived from the purpose to be sought. By way of example, Scottish Burial Reform and Cremation Society v. Glasgow Corporation[71] involved a non-profit-making society, the dominant purpose of which was to encourage and provide facilities for cremation. In holding the society charitable, all of the judges in the House of Lords, drawing on different kinds of evidence, explained in some detail the public benefits to be derived from cremation.[72]

It would appear from the cases that the requirement of a public benefit differs in respect of each category set out in Pemsel's case. And textbook writers commonly discuss the requirement separately for each category.[73] There is much artificial learning involved in reconciling cases and revealing the apparent nuances in the law in relation to whether a purpose contains a public benefit. Suffice to say here that the question would appear to require the courts to address themselves in each case to the value and factual question of whether there is a public benefit to be served by the disputed purpose. However, to provide the appearance of certainty in application, and because judges prefer to be seen reasoning by analogy to previous cases instead of addressing directly issues of social policy, judges tend to turn the issue into a legal one. Thus instead of treating it as largely an empirical question involving value judgments, they often appear to resolve it solely by using analogical reasoning.

The second aspect of this test is that it must be shown that the 'public' will benefit from the purpose. That is to say, that the purpose will serve the interests of not only a small number of persons but some cross section of the community.

Again there is much 'legal learning' on the question of how large the group to benefit must be, but the basic proposition is an obvious one. If the purpose will not benefit a sufficiently large number of persons and the benefit is not potentially available to members of the public the state has no interest in enforcing it.[74]

3 Preamble to the Statute of Uses, 1601

A third requirement of a valid charitable organization, and the one that has caused the most difficulty for legal commentators, is that the purpose of the organization must fall within "the letter or the spirit and intendment" of the preamble to the Statute of Uses, 1601. This has been interpreted to be the holding of Morice v. Bishop of Durham, discussed above.[75]

There is little question that the courts have traditionally taken this test extremely seriously.[76] In virtually every doubtful case they have felt compelled to draw an analogy between the disputed purpose before them and a purpose listed in the preamble or a purpose in some previous case which in turn had been held to be directly analogous to a purpose listed in the preamble. In this way the courts often find themselves three or four analogies removed from the preamble in holding a particular purpose to be charitable. For example, in a recent case in holding that the provision of a crematoria was charitable the court stated that the purpose was analogous to the preservation of cemeteries, which had been held to be a charitable purpose because it was analogous to the upkeep of a churchyard, which had been held to be charitable because it was analogous to the repair of churches, which was mentioned in the preamble. In another case the issue was whether a volunteer fire brigade was charitable. The courts held that it was since it was analogous to a lifeboat, which in turn had been held to be charitable since it was analogous to a "seabank," which was mentioned in the preamble. These kinds of examples of far-fetched analogy drawing could be multiplied one-hundred fold. Why do the courts do it? Is there some mysterious legal interest served in this form of reasoning?

Obviously not. It is clear from what was said above that the preamble to the Statute of Uses, 1601 was never intended to be a complete or even representative listing of charitable activities. Indeed, some of the purposes listed there - for example, trusts for the marriages of poor maids, relieving low-paid workers from paying taxes, or redeeming prisoners - would probably be no longer considered charitable themselves.[77] The Act itself, of course, has been long since repealed.[78] Most importantly, it has never been clear what criteria the courts are to use in drawing analogies in this area.

This is not the place to attempt to explain the court's use of the preamble in defining a charity. But in terms of understanding the common law methodology in this area a couple of points might be noted about its use. First, it is reasonably clear that the mandatory reference to the preamble has not prevented the courts from adapting the concept of charity to modern conditions. Invariably the courts have not been able to make a suitable analogy to the preamble, or cases that have analogized to it, only in those circumstances where the particular purposes served no public benefit. In cases where the purpose serves a public benefit, and otherwise passes the tests for a charitable purpose, invariably an appropriate analogy has been found.[79]

Secondly, recent English cases appear to have completely assimilated the 'analogy to the preamble' test with the 'public benefit' test. In Scottish Burial Reform and Cremation Society v. Glasgow Corporation,[80] Lord Wilberforce explained that there were two ways in which an analogy might be made to the preamble of the Statute of Uses, 1601. First, a direct factual analogy might be made to a specific purpose in the preamble or to the facts of a case which in turn analogized to the preamble. Secondly, since a common element of public utility runs throughout the preamble's listed purposes, an analogy to its "spirit and intendment" could be made by simply showing that the purpose in question contained an element of public utility.[81] This latter approach was approved by all the judges of the English Court of Appeal in a more recent case, Incorporated Council of Law Reporting for England and Wales v. Attorney-General.[82] For example, Sachs L.J. stated that in analogizing to the preamble "the correct approach is ... Lord Wilberforce's wider test ... The analogies or 'stepping stones' approach was rightly conceded on behalf of the Attorney-General not to be essential: its artificiality has been demonstrated in the course of the consideration of the numerous authorities put before us. On the other hand, the wider test - advancement of purposes beneficial to the community or objects of general public utility - has an admirable breadth and flexibility which enables it to be reasonably applied from generation to generation to meet changing circumstances."[83]

Although no Canadian case has yet explicitly broadened the analogy test in this way,[84] undoubtedly this is the direction that the courts will take.

4 Against Public Policy

A final test that a purpose must satisfy in order to be held charitable might be broadly stated as follows: the purpose must not infringe a recognized disqualifying factor. Basically for a trust purpose to be charitable there must be (a) an absence of 'self help', (b) an absence of profit distribution, (c) an absence of substantial political element, and

(d) an absence of related noncharitable purposes. These prohibitions will not be elaborated upon here. With the exception of the absence of a substantial political element, which will be discussed in Chapter 2 of this paper, their necessity and application are self-evident.[85]

E CRITICISMS OF LEGAL DEFINITION OF CHARITY

Many commentators have expressed dissatisfaction with the common law definition of charity. Most frequently their complaints relate to the morass of confusing and apparently inconsistent case law on the subject, and that the common law definition is "rooted in a long-since-repealed statute of 1601."[86] George Keeton, one of the leading legal commentators on the law of charity, has written that the experience of the English judiciary in attempting to define charity is "probably the worst exhibition of the operation of the technique of judicial precedent, which can be found in the law reports."[87]

Judges, as well, have been critical of the law. Recently, for example, Foster J. of the English Court of Appeal complained, "I find it incredible that the law on this subject is still derived from the preamble to the Statute of Elizabeth I, long since repealed and long since out of date, and in modern times applied by analogy upon analogy upon analogy. It is time this branch of the law was reconsidered, rationalized and modernized."[88] This kind of criticism has been made of the decisions of the legal definition of charity in virtually every major Commonwealth country. As two of the leading commentators on the law of charities have noted:

> Commonwealth courts have tended to adopt the same pragmatic approach to the perennial problem of defining a charity as the English courts, and their law reports contain similar unsatisfatory decisions and fine distinctions to the those of England. None of them have been able to find any comprehensive principle, or group of principles, to which the decisions may be related.[89]

Before analyzing the criticism of the common law, the various reform efforts that have been made in England over the last 50 years will be reviewed. This review will reveal the kinds of specific concerns that have lead to the pressures for change, and the various kinds of responses.

PART II REVIEW OF ATTEMPTS AT REFORM IN U.K.

A Royal Commission on the Income Tax, 1920[90]

Following the House of Lord's decision in Pemsel's case, Inland Revenue was obliged to grant a tax exemption to all trusts and associations that were charitable within the trust law meaning of that concept. They were apparently uneasy over the wide range of activities that this resulted in the Treasury providing an uncontrolled subsidy to.

In 1920, Inland revenue got a chance to make its views known. In 1918, the British Government appointed a Royal Commission on income tax. In a memorandum that the Board of Inland Revenue was invited to submit to the commission on the exemption from income tax enjoyed by charities, the board suggested that the definition should be substantially narrowed. After reviewing the law, the board noted that in deciding on a definition of charity for income tax purposes a number of factors should be considered, including the facts that: "every exemption from income tax throws an additional burden on the cost of the community; every charitable institution or body which obtains an exemption from income tax may be represented as receiving a concealed subsidy from the state unaccompanied by state control ...; the effect of the exemption ... is to force the state into the position of subsidizing (charitable societies) in perpetuity ...; the interpretation of the word 'charity' for income tax purposes is derived from an Elizabethan statute, which was designedly wide in terms, because it was enabled to protect from misapplication of their funds various kinds of trusts primarily intended to benefit the poor or the community. It is open to question whether a wide interpretation derived in this manner is proper in relation to an exemption from income tax ..."[91]

The Board on Inland Revenue concluded their memorandum by noting that if the Royal Commission decided that the definition should be restricted it might confine income tax relief: "(a) to charities concerned primarily to benefit classes of persons with small incomes, which, if not below the limit of exemption, are subject to little or no tax after allowance of all reliefs; and (b) to other charities not falling under (a), but conforming to the popular conception of the terms, example, to charities for the relief of physical distress."[92] They went on to suggest that if the state wished to subsidize groups other than those mentioned in this definition, it should do so by a direct subsidy.[93]

In its report, the Royal Commission reviewed the arguments put forth by Inland Revenue.[94] However, it noted that in view of the strong opposition that was aroused by Gladstone's attempts to curtail the tax relief enjoyed by charities in 1863, and the fact that they did not ask specifically for evidence on the general question, it could not recommend curtailing tax relief for charities.

The commission went on to suggest that without altering the broad legal concept, "for the purposes of income tax 'charities' should be specifically redefined by Parliament."[95] Their reason for expressing this opinion is unclear. Earlier in their report they had noted that "The term 'charitable purposes' ... covers activities which the ordinary man would not regard as charitable at all, because when he uses the word charity he generally has in mind the relief of poverty, sickness, and other forms of distress."[96] So perhaps the suggestion for a statutory definition was made simply to make it clear that for income tax purposes the concept has a much broader meaning than it has in ordinary usage. In any event, aside from the argument for restricting the definition of charity, in 1920 there appeared to be no general dissatisfaction with the common law definition of charity.

B Income Tax Codification Committee, 1936[97]

In 1927 the Chancellor of the Exchequer appointed a committee to codify the law relating to income tax. The aim of the committee was to simplify the law to make it "as intelligible to the taxpayer as the nature of the legislation admits."[98]

Although the committee "received several suggestions that (it) should include in the Bill a definition of 'charitable purposes'," [99] it decided against codifying the common law concept because to do so would be impracticable and there was no need for such codification. Most of the problem, they suggested, arose in the application of the law to particular factual circumstances. They reasoned that:

> (The common law concept) has been the subject of judicial interpretation in a long line of cases in which it has been applied to differing sets of circumstances. We felt that it would be quite impracticable to attempt a fresh definition, and that there was no real need for such an attempt, as the existing provisions had not given rise to any very great problems of interpretation, the chief difficulty having arisen in the application of the provisions to particular facts, which vary greatly according to the circumstances of the persons and bodies of persons claiming exemption.[100]

C Nathan Committee Report, 1952[101]

In the 1940s two currents of thought merged to create pressure for reform of the English law of charities. First, and more generally, concern was being expressed over the role of charity in the modern welfare state. This concern became more focussed following the publication by Lord Beveridge in 1948 of a book entitled Voluntary Action: A Report on Methods of Social Advance.[102] His general theme was that there was need for "political intervention to find new ways of fruitful cooperation between

public authorities and voluntary agencies." He urged the state to "use where it can, without destroying their freedom and spirit, the voluntary agencies for social advance." Convinced that charity law was in need of reform if this objective was to be achieved, he called for the establishment of a Royal Commission. Lord Beveridge's main concern, and the concern of most of those at the time who spoke in the House of Lords and in other forums for the reform of charity law, was with the machinery for supervising and rationalizing voluntary action. However, the question of the definition of charity also arose in this debate.

In addition to arising as part of the discussion of the function of charity in the welfare state, the definition of charity became a matter of concern following apparently anomalous legal decisions on the definition of charity in the 1940s. This caused leading legal commentators to call for reform of the definition.[103]

As a result of these pressures, the Prime Minister appointed a Royal Commission, under the chairmanship of Lord Nathan: "to consider and report on the changes in the law and practice (except as regards taxation) relating to charitable trusts in England and Wales which would be necessary to enable the maximum benefit to the community to be derived from them."[104] Although the committee dealt with many issues relating to the law of charities, it heard a good deal of evidence on, and devoted one chapter in its report to, the legal definition of charity.[105] Its discussion is cautious but sensitive.

First, the report notes that generally the lay persons who appeared before the committee favored a statutory definition of charity on the grounds that the language of the preamble of the Statute of Uses, 1601, upon which the law was based, was archaic and that particularly Lord Macnaughten's fourth category of charitable purposes "other purposes beneficial to the community" was too uncertain in its application. On the other hand, the committee noted that the lawyers who appeared before it were almost unanimous in opposing codification. The lawyers appeared to have expressed three concerns to the committee.

First, the lawyers were doubtful if a statutory definition could be devised that would resolve borderline cases. The concept of charity had a well-known core meaning, they argued, but given the wide diversity of charitable activities that people can engage in there will always be a fringe area in which uncertain cases arise. The committee appeared to agree with the lawyers on this point. It noted that "if the primary object that the content of charity should remain flexible is to be secured, the law must continue to be judge-made and ... it is a complete delusion to suppose that to start with a clean slate would reduce the number of difficult cases or the volume of litigation."[106]

Second, the lawyers argued that a statutory definition might tend to freeze the concept of charity. The common law definition was able to evolve by analogy as changing social and economic

conditions presented new problems. Again, sensitive to this objection by the lawyers, the committee noted that on the one hand it was being urged to devise language which would be 'flexible,' but on the other would introduce greater certainty in the law. It noted that these largely incompatible goals were often urged by the same witnesses.[107]

Finally, the lawyers appeared to express concern that a statutory definition would render the enormous case law that had been built up irrelevant. This would create a period of great uncertainty and expense to litigants, as the "process of building up case law would ... start all over again."[108]

The committee by and large agreed with the views expressed by the lawyer witnesses that there would be little to gain and a certain amount of risk in codifying the common law definition of charity.[109] However, it went on to consider two other possible legislative changes. First, it considered recommending that the preamble of the Statute of Uses, 1601 be restated in modern language and improved. It decided not to make this recommendation since it might disturb the case law, and it "would be both impracticable and wrong in principle - impracticable because the enumeration would almost certainly prove incomplete from the outset and wrong in principle because, so far from leaving the control of charity flexible and responsive to changes in the structure of society, it would fix it in rigid mould."[110]

Second, it considered, and recommended, that "the existing 'definition' of charity by reference to the Preamble to the Statute of Charitable Uses should be repealed and that in its stead there should be put on the statute book a 'definition' based on Lord Macnaughten's classification, but preserving the case law as it stands."[111] The committee did not feel that this recommendation would necessarily render the law more certain, but "it might give somewhat more freedom to the judiciary in applying the well-established principles of the existing law to the problems of an age of rapid and continuous change."[112]

Before leaving this review of the Nathan Committee's Report, it should be noted that even though their mandate was broad - the function of charity in the welfare state - the committee did not express any dissatisfaction with the general scope of the common law definition of charity.[113] Also although there were a few suggestions that some details of the law should be changed, for example, to make it clear that the definition covered such things as the relief of sickness and scientific research, the committee felt that the common law was reasonably clear on these and other various details.

D Government White Paper on Charitable Trusts in England and Wales, 1955[114]

Two and a half years after the publication of the Nathan Committee Report the government responded. The Nathan Committee had been appointed by a Labour Government, and the government

White Paper was written by a Conservative Government. Therefore, not surprisingly, it did not race to embrace any of the conclusions of the report. Even the small degree of increased planning and the increased government coordination of and supervision over the voluntary sector contemplated by the Nathan Committee had fallen out of favor.

With respect to the issue being reviewed here, the government agreed in its White Paper with the committee that there was "no reason to change the present content of charity."[115] However, it also did not see any reason to codify Lord Macnaughten's classification of charitable purposes and repeal the need to refer to the preamble of the Statute of Uses, 1601, as proposed by the committee. The government concluded that (1) the committee's suggestion was not practicable, (2) the authoritative basis of the existing case law could not be preserved without preserving the preamble of the Statute of Uses, 1601 and (3) any attempt at a statutory definition would necessarily be new in substance as well as form and therefore result in a change of the law, which everyone agreed was not necessary.

E Royal Commission on the Taxation of Profits and Income, 1955[116]

In 1951, 35 years after the Colwyn Report, a second Royal Commission was appointed to comprehensively review the income tax structure, including the taxation of charitable donations and organizations. Indeed it was because of the appointment of this committee that the subject of taxation was specifically excluded from the Nathan Committee's terms of reference.

All members of the Royal Commission on Taxation of Profits and Income appeared to be concerned generally about the indiscriminate subsidy provided by the tax concessions to charities. The authors of the majority report, for example, observed that "There is no public control of the object of a charity from the point of view either of importance or utility. Nor is there any regular organized scrutiny of the administration of charitable funds. Yet, so long as the charitable purpose persists and is observed, the state automatically returns to the charity the tax on all its income - a concession which amounts at present to a virtual doubling of that income."[117] Two members of the commission who expressed reservation to the majority's conclusion on the taxation of charities were even more concerned: "We must point out ... that where direct government grants are made to approved objects, it is the invariable practice to review them from time to time and adjust them, if necessary, to the economic exigencies of the moment. The vice of automatic, indiscriminate exemption is that is achieves precisely the opposite result. The higher the prevailing rate of income tax, the higher is the blind and hidden subsidy contributed by the state; and this subsidy is never investigated or weighed."[118] With this critical attitude toward tax concessions for charities generally, although they did not recommend abolishing the exemptions, it is not surprising that all commissioners recommended restricting the definition of charity.

After noting that the definition of charity or tax purposes followed the definition for purposes of trust law, the majority expressed two concerns about the definition. First, they expressed concern about "the undue width of the range of what ranks as charitable for (tax) ... purpose."[119] Second, they noted that, "Its limits are indeterminative."[120]

It is unclear from their report exactly why the majority commissioners felt that common law definition of charity was too broad for tax purposes. They said "The question as we see it is whether the income devoted to charitable purposes ought to be freed from tax ... no matter how widely the legal conception of charity may depart from the more limited conceptions of ordinary use which give it its special sanctity."[121] Even assuming that in ordinary usage the concept of charity has a more limited meaning than the legal definition, it is unclear why the usage of the term in ordinary language should dictate its content in tax law, or what "special sanctity" it gives the definition in tax law. The commission's primary concern with the uncertainty of the legal definition apparently was that it permitted many charities engaged in essentially frivolous activities to be registered.

Based on the above two concerns the majority of the commissioners recommended a statutory definition along the following lines: "the relief of poverty, the prevention or relief of distress, the advancement of education, learning and research, the advancement of religion."[122] Their conclusion was stated in strong language "a new and more restrictive definition ... is the only satisfactory line upon which reform can proceed ... the present situation is hardly less than chaotic and the prevailing uncertainty does not do credit to the tax system."[123]

The two members of the commission who expressed reservations to the majority's recommendation on charities favored an even more restrictive definition. The dissenters were John R. Hicks, Drummond Professor of Political Economy at Oxford, and Sylvester Gates. They felt that the total tax exemption for charities could only be justified "where a charity performs functions which are a well recognized responsibility of the state".[124] They thus agreed with the definition of charity as proposed by the majority, but would confine it to charities within the defined class that could show they were "indispensable."[125] Since they admitted that distinguishing between charities that were "essential or merely desirable" would be an impossible task, they were content to recommend that charities, even as defined restrictively by the majority, should be given only a partial tax exemption.[126]

Three commissioners wrote a minority report. They might be described as the Labour Party sympathizers: G. Woodcock, H.L. Bullock and N. Kaldor. On the issue of the taxation of charities they stated that they "entirely agree with the Majority of the Commission that to introduce into the tax code a definition of a charity 'at once a more limited and precise' than the present definition is a necessary and practicable reform."[127] They also

agreed that charities should only be entitled to a partial exemption as suggested by Hicks and Gates.

F The Charities Act, 1960[128]

In 1960, the recommendations of the Nathan Report, as proposed to be modified by the government White Paper on charitable trusts, were finally dealt with by a statutory enactment. The Charities Act, 1960 not only consolidated, re-enacted and codified much of the law and practice relating to charities, it made a number of major reforms. In particular, it reinstituted the Charity Commission, established a control register of charities, established a statutory foundation for voluntary cooperation between charities and government welfare services, and extended the cy-près doctrine so as to make it easier for charities to adjust themselves to rapidly changing needs.[129] Following the recommendation of the government White Paper[130] the Act did not, however, contain a definition of charity. Thus, the common law definition was to remain intact.[131]

In the debate on the Bill, particularly in the House of Lords, a few Labour and Liberal members of the House argued that even the Nathan Committee had been overcautious in its recommendation relating to the definition of charity. They argued that charitable purposes should be defined in the Act, and in most instances they suggested that it should be less restrictive than the common law meaning. Indeed, Lord Silkin, who was the chief proponent of this view, went so far as to introduce a suggested statutory definition in the House of Lords.[132] He argued that a definition was needed since the "vast number of cases" on the definition of a charity were often contradictory and "difficult of access and understanding by an ordinary person who desires to create a trust."[133]

Lord Silkin was supported in his suggestion for a statutory definition by Lord Chorley, a legal scholar and professor at the London School of Economics.[134] Lord Chorley's chief concern was the "the definition of 'charity,' as applied in the courts, has become too narrow for the purposes of the modern world, and the courts have been finding it very difficult ... not unnaturally ... because of our doctrine of precedent ... to develop the law relating of charities in the way required by the circumstances of the world in which are now living in 1960."[135] He felt that generally "public purposes," widely interpreted, should be regarded as the sole interest of charitable purposes, and he proposed a definition to implement this notion.[136]

In spite of the speeches of these two Lords most members of both Houses were strongly opposed to the codification of the definition of charity. In the House of Commons, Sir Lynn Ungoed-Thomas expressed the dominant sentiment. He stated that he was "strongly and firmly opposed to there being any definition of charity."[137] He noted that some wanted the definition broad, others wanted it narrower, some wanted it more flexible, others more precise, and any debate on the subject would be hopeless. He

mentioned that one reform that might be undertaken would be to "cut off the Statute of Elizabeth." However, he was concerned that no one knew for sure what effect this would have, and it would likely just "mean more work for lawyers." Others in the House of Commons expressed some surprise that the lay members of the House did not push harder for a statutory definition, but most apparently were content with the explanation that a definition would be almost impossible to draft.[138]

In the House of Lords numerous Lords opposed a statutory definition; largely on the grounds that it would be impracticable and that little would be gained.[139] Lord Silkin replied to the concerns expressed about his definition by saying that in proposing a definition he merely wished to give a guide to donors, "in the same way that the Act of 1601 was a guide," and that he had not intended "that the body of Case Law which has been built up should be completely disregarded."[140] He withdrew his proposed amendment in order to study the criticism that were made against it.[141]

The commentators on the statute were generally in agreement with the arguments put forward in debate as to why the concept of charity should not, or could not, be codified.[142]

G The Expenditure Committee, Tenth Report: The Charity Commissioners and Their Accountability, 1974-75[143]

In 1975 the Education, Arts and Home Office Sub-Committee of the Expenditure Committee undertook a study of the public accountability of the Charity Commissioners. During the course of their investigation they came to the conclusion "that there are two main problems requiring solution: (a) the need for a proper legal definition of charity; and (b) the need for improved machinery."[144]

The conclusions (and reasoning) of the report are confusing.[145] The authors note that "Virtually all our witnesses, although concerned about the ambiguity of the definition of charity, were not only unable to put forward a satisfactory solution but also reluctant to recommend that there should be a new statutory definition of charity."[146] In spite of this, in the body of their report the committee states "We wish to restate the Macnaughten judgment in terms more appropriate to the present day. This would mean arriving at a legal formula which is flexible both in admitting development and effective in dealing with redundancy, obsolescence and abuse."[147] They then admit they did not have an idea how such a rule would be drafted. More surprisingly, in their general recommendation on this subject they simply recommend that "legislation should be introduced whereby all charities should be required to satisfy the test of purposes beneficial to the community."[148] This recommendation is surprising since not only does it not suggest a new definition, but also it simply states the present law.[149]

Indeed, it is difficult to discern from the committee's report exactly what aspect of the present law concerned it, or what evidence it had that the present law was not achieving its stated ideals of statutory test.

Following its general recommendation the committee went on to make three specific recommendations relating to the definition of charity: (1) that charities be allowed to engage in political activities, so long as they remain subordinate to the main purposes of the charity,[150] (2) that only educational institutions satisfying a clear range of educational needs for the community at large fall within this scope of charity,[151] (3) that something should be done about the problems facing humanist organizations that under the present definition do not qualify as religious, and that further investigations should be undertaken of "fringe" religious groups.[152]

One of the commentators on the committees report concluded that:

> It cannot really be said that the Expenditure Committee gathered a sufficiently broad range of evidence to enable them to make a particularly valuable contribution towards a new definition of charity. Nonetheless, if lessons can be learned from the shortcomings of their report, and if the views of those who presented memoranda and oral evidence to the committee can be studied carefully, it may be possible for the Goodman Committee to come up with a more worthwhile solution to the daunting task of finding a satisfactory definition of charity.[152]

H Goodman Report, 1978[153]

Since this is the most recent and thorough report in England to deal with the problem of the legal definition of charity, its genesis will be briefly reviewed. The committee which produced the report was established by the National Council of Social Welfare (NCSS). The NCSS is somewhat akin to the Coalition of National Voluntary Organizations in Canada. It is a council consisting of some 600 representatives of national voluntary organizations. Its purpose is broadly to encourage and support voluntary social actions by individuals and social groups.[155] In the early 1970s a number of its members expressed concern that the existing charity law and its administration put impediments in the way of the work and development of voluntary organizations. Among the specific concerns expressed were that:

> (a) There was increasing disquiet as to what constituted permissible "political" activity, which was of great significance to organizations wanting to promote social reform or public education to achieve

their objects. The advice given by the Charity Commissioners in the Annual Reports 1969 and 1973 was not thought to go far enough.

(d) There was some uncertainty as to the charitable nature of international, recreational and environmental activity.

(f) Finally, due to the high cost of legal proceedings, the right of appeal against decisions of the Charity Commissioners, and the Inland Revenue were ineffective. Because of their financial state, charities were unable to appeal and the commissioners were unable to discover the attitude of the courts to new legal points, and in essence the flexibility which could exist within the current interpretation of the law was lost.[156]

As a result of these concerns, the NCSS organized a national conference on the subject of charity law in February of 1974. Following the conference the Council's Executive Committee decided to establish an independent "Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organizations." Lord Goodman agreed to act as Chairman. The areas that the committee were to examine included: the definition of charity; the legal benefits and fiscal privileges which charities receive; and matters concerned with the administration, registration and surveillance of charities.[157]

The committee's basic recommendation with respect to the definition of charity was the following:

> While we cannot devise a neat encapsulated definition of charity, we recommend that the categories of charities should be restated in simple and modern language replacing that of the Act of 1601 and extending these to include objects now considered to be within the scope of charity. This would make existing case law irrelevant but the courts would have more freedom to reconsider it in the context of the new categorization.[158]

Thus, the committee did not propose a new definition of charity. It might be noted that they reached the conclusion not to suggest a new definition with great reluctance. In his preface to the report, Lord Goodman noted that initially the inclination of the members was that a new definition was needed: "We started off, or most of us did, in the firm belief that the old definitions could be discarded like old hats and in no time at all the talented milliners on the committee would produce a totally new model. Discussion and experience have taught us otherwise. There

is no simple definition that would not cause many underserving causes to qualify and a large number of deserving ones to be excluded."[159]

The committee reached its recommendation after concluding that the present definition should be neither radically restructured to include only the alleviation of poverty or expanded to embrace all non-profit organizations. They rejected the former suggestion since they felt that "There are many fields where the control which tends to go with state assistance can be unwelcome and this applies especially to the arts and provision for cultural and recreational facilities. Charity is increasingly moving into these fields and this is a development which in our opinion is to be welcomed."[160] They rejected the latter suggestion because of the revenue consequences and possibilities for abuse such a recommendation would have. In view of these considerations, in the text of their report, they concuded "While, therefore, we believe that the ambit of charity should remain flexible and capable of growth ... the existing concept should remain despite the difficulties of definition."[161]

The committee then went on to note that they did not believe it was possible or desirable to formulate a definition that would make reference to the existing case law unnecessary.[162] They did, however think that the language of the preamble to the Statute of Uses, 1601 should be updated. This would relieve judges of the necessity of performing the "mental gymnastics" involved in attempting to fit present day activities within the antiquated language of the preamble. Updating the language of the preamble would preserve both the flexibility of the present law but also the present case law: "As it would be made clear that this new classification is an updated version of the old classification, we do not think that the existing case law would become unrelevant."[163]

Following its general recommendation on the definition of charity, the committee then went on to make a number of specific recommendations relating to areas where the existing case law had been the subject of criticism. The following summary of recommendations were made following Chapter 2:

a Poor Relations - these charities are not justifiable and should therefore not be charitable henceforth.

b Charities for Employees by Employers - should not qualify as charities.

c Provision should be made in the above two cases for existing charities.

d Charities defined by reference to Locality, Denomination, Sex, Race or Color - we see no difficulty about charities benefiting specific groups providing that discrimination is not the motive but charities where the beneficiaries are defined by reference to race or color should be discouraged.

e Trusts for Special Needs - provided all requirements for charitable status are present the fact that the beneficiary class may be small should as at present be no bar to charitable status.

f Charges for Services - the fact that an organization may have to make charges should be no barrier to charitable status provided its objects are charitable because of their benefit to the community.

g Deprivation of charitable status should not be used as a way of discouraging private education or private medicine.[164]

The following summary of recommendations were made following Chapter 3:

a Religion - should continue to qualify for charitable status but religions considered detrimental to the community's moral welfare should be excluded.

b Ethical and Moral Societies - the same principles should apply and they should also be granted charitable status.

c Contemplative Communities - do not normally have proper charitable objects but a value judgment has to be made in each case.

d Prevention of Poverty - it is impracticable to extend the prevention of poverty beyond the present practice but this is a field into which charity might extend under the process of natural growth.

e Education - should continue to be a recognized head of charity.

f The Arts - the promotion of the Arts should be a proper charitable object in its own right because it is undoubtedly for the benefit of the community. It should not be regarded as a sub-branch of education.

g Research - should be a charitable object in its own right.

h Learned Societies - should continue to enjoy charitable status if they are designed to increase the common stock of knowledge.

i Propaganda - the alleged distinction between education and propaganda requires further consideration but it is accepted that there are forms of both political and commercial propaganda which should be excluded.

j Sport - the encouragement of sport and recreation should be recognized as an independent charitable object provided the necessary elements of altruism and benefit to a sufficient section of the community are present. Insofar as the existing law does not make this clear it should be amended.

k Animal charities - no change should be made in the charitable status of these organizations.

l Advice giving - this should in appropriate cases become a charitable object.

m Housing -

i for the poor, the aged and the sick should continue to enjoy charitable status;

ii Housing Associations which are registered with and follow a policy of tenant selection laid down by the Housing Corporation should be recognized as charities.

n Charities for the Environment - these trusts should continue to enjoy charitable status and their scope be widened.

o International Activity -

i no distinction should be drawn between charitable activity by English charities at home and abroad. Any object charitable at home should also be considered in principle charitable when carried out abroad;

ii as regards charities which might contravene foreign public policy there should be a procedure as outlined in paragraph 89.

p Charities Constituted Abroad - the law governing these should remain as it presently is but consideration should be given to allowing foreign arrangements can be made by international convention.[165]

Ben Whitaker, the author of a well-known book on foundations, wrote a Minority Report. Among other dissenting views, he expressed the opinion that although ideally perhaps "charitable status would be any purpose beneficial to the community ... since charitable resources and the public's ability to give tax relief are limited ... the first priority should be to concentrate ... on deprivation and the disadvantaged."[166] He, therefore, proposed that a definition should focus primarily on "the prevention and relief of deprivation (whether physical, mental or social), provided always any resultant benefit is equally accessible to all relevant members of the community who wish to avail themselves of it (irrespective of race, sex, religion, politics or social class)."[167]

The commentators were highly critical of the report's recommendations relating to the definition of charity. Without being clear about what direction it had wished the committee would have taken, an editorial in the New Law Journal implied that the committee's list of 26 headings to replace the preamble to the Statute of Uses, 1601, added little to the present law.[168] The author of a well-known treatise on the law of equity called them simply "a recipe for further litigation."[169]

A more fundamental criticism of the report's recommendations was levelled by Roger Cotterrell, a lecturer in law at Queen Mary College, University of London. He charged that "much of what this report ... has to say on the legal meaning of charity is complacent, often infuriatingly vague and lacks any clear unifying perspective."[170] He goes on to question "how any truly coherent proposals for reform are possible without a consideration, however brief, of the role of charity in modern society."[171]

As yet, none of the recommendations of the Goodman Report relating to the definition of charity have been implemented in England.

PART III CODIFYING AND REFORMING THE DEFINITION OF CHARITY

A Should the Definition of Charity be Codified?

1 Views of Judges and Commentators

In spite of the fact that some commentators and even judges have been critical of the jurisprudence relating to the question of, and the methodology used by judges in defining, what is a charity, the majority of judges and commentators who have addressed the issue have opposed codification. Most commonly it is asserted that a statutory definition would be impossible to draft. For example, in 1975 the English Chief Chancery Master asserted, "The problem of attempting an exhaustive definition of charitable purposes ... has been attempted from time to time but has been given up as hopeless ..."[172] Even assuming that a statutory definition could be drafted, others fear that its adoption would, initially at least, create a great deal of uncertainty and eventually give rise to many of the same problems that the present common law definition is perceived to give rise to. In a recent English case Sachs L.J. observed that "Any statutory definition might well merely produce a fresh spate of litigation and provide a set of undesirable artificial distinctions."[173] Finally, the inconsistency of attempting to draft a definition that is more certain than the common law concept, but at the same more responsive to changing social needs, has frequently been noted. In opposing the codification of the definition of charity the English Charity Commissioners stated in their 1973 Annual Report that to assert "that it would be beneficial to have a statutory definition ... presupposes two facts, first that it is possible for a statutory definition to be so precisely stated that the area of doubt would be eliminated or at least substantially reduced, and, second that the real if limited adaptability to changing social circumstances which is at present possible would be retained."[174] The commissioners felt that neither of these presuppositions were true.[175]

Even those English commentators who have been most critical of the jurisprudence relating to the definition of charity seem to feel that a statutory definition would not be an improvement. They prefer to pin their hopes on enlightened judicial decision-making. As George Keeton, perhaps one of the most informed and outspoken critics of the courts' efforts in this area, has asserted, "It is difficult to see what value could be gained from enacting the Pemsel definition ... In the long run, there is probably no alternative to the work of rationalization being undertaken by appellate courts."[176] He has also suggested that "Any future statutory definition, although drafted with greater regard to logic and flexibility, would in due course become as technical as the present definitions, for the same reason."[177]

In the United States the commentators have opposed unanimously any attempt to codify the concept of charity. In part, this undoubtedly reflects their general satisfaction with the common

law development in that country. The judges there have taken a much less formalistic approach in defining charity than either English or Canadian judges. Typical of the comments supporting the common law development of the concept of charity is the following by Professor Boris-Bittker of the Yale Law School and a co-author:

> Despite the vagueness of the term and the divergent activities which it embraces, the unadorned reference to 'charitable' purposes in para. 501(c)(3) has created only minor problems of interpretation for tax planners, administrators, and the courts ... it is not likely that a detailed statutory definition would eliminate these residual problems of distinguishing between 'charitable' and 'non-charitable' purposes, save by an unending process of amending the Code to settle every boundary dispute as it arises. (footnotes committed)[178]

Austin Wakeman Scott, the leading American trust scholar has written:

> The truth of the matter is that it is impossible to frame a perfect definition of charitable purposes. There is no fixed standard to determine what purposes are charitable ... a definition ... (cannot) include what should be included and exclude what should be excluded. Matters of grave policy like this cannot be solved by definition.[179]

Finally, it remains to note that here in Canada we also have it from the highest authority that the common law definition of charity is satisfactory. The Royal Commission on Taxation (Carter Commission) noted in a brief sentence that "the definition in the Pemsel case appears to us to be generally satisfactory for tax purposes."[180]

2 Review of Factors to be Considered in Determining Whether the Definition of Charity Should be Codified for Tax Purposes

A number of criteria are commonly used by legal policy-makers in deciding whether a well-developed legal concept, such as charitable purposes, should be codified. Most commonly they are put in the form of arguments in favor of codification and as criticisms of the common law concept: (1) it has not and cannot evolve to take account of changing social needs; (2) its application is unpredictable; (3) it is inaccessible; and (4) it has been distorted since the same concept is applied in a number of different areas of the law.

In this section of the paper these four factors will be reviewed as they relate to the concept of charity. The conclusion

of this examination is that if there is a case for codifying the common law concept of charity it is not a strong one: the present jurisprudence has adopted to changing needs and values (although not in as rational a fashion as might be wished); although the application of the present definition of charity is uncertain in borderline cases this uncertainty has not imposed serious costs and it might be difficult to clarify in a statutory enactment; the present law is accessible through any one of a number of treatises on the subject; and the fact that the same definition of charity is used in both trust and tax law has not caused serious problems. Codification of the concept might be a slight improvement over the present law in each of these respects; however, it is not clear that it is worth the cost or risk. It is generally accepted, at least among common law lawyers, that because of the costs involved in enacting a statutory enactment, and the risk that such codification might have unintended effects, a case must be made for codification.

(a) Flexibility and Changeability

In general, law, whatever its form, should be responsible to changing social values and conditions. A justification sometimes given for codifying a well-developed common law concept is that the concept has become rigid and unresponsive to demands for growth.

The concept of 'charity,' perhaps more so than any other, must be capable of evolving to apply to new ways of dealing with old problems and to new purposes designed to serve changing needs and values. Does the common law concept meet this criterion? And even to the extent that it does, would codification permit a more orderly evolution of the concept?

It is frequently asserted that because the common law of charity is premised on the preamble to a statute passed in 1601, it is incapable of growth. However, this argument ignores the dynamics of the common law methodology. The courts have extracted general principles from the preamble to the Statute of Charitable Uses, 1601, such as that purposes to be charitable must be "beneficial to the community" and involve no "private interest." As new needs emerge, the courts continue to expand the activities that can be classified as charitable by reference to these principles. Indeed, it is difficult to imagine principles that would lend themselves better to changing values and conditions. However, it is the case that the courts expand the list of purposes which they hold to be charitable by analogy to purposes previously held to be charitable. But this does not necessarily make their methodology rigid. The purpose of elaborating on the relevant principles by this form of analogical reasoning is to render the process of decision-making more efficient and predictable.

If Revenue Canada or the courts were required to make a factual inquiry about the public benefit of every purpose that purported to be charitable that came before them, or even every newly-expressed purpose, the process would be expensive and time

consuming. Instead, the courts are content to reason by analogy. That is to say, they reason that if a purpose previously held to be charitable is factually similar to the purpose before them, then they will in effect, assume it has a sufficient element of public benefit. The further removed the factual similarity, the less likely the court will hold it to be charitable. This incremental development of the concept of charity is not only efficient, but also provides the application of the concept with a degree of predictability. Without the stability provided by reasoning by analogy, the open-ended principle - public benefit - would leave enormous room for arbitrariness and uncertainty in decision-making.

So, in principle, the common law methodology does provide room for the gradual evolution of the concept of charity. Have the courts in fact developed the concept in this way? The judges certainly think that they have. They have said so on countless occasions. Most recently - for a typical example - Lord Hailsham of the English House of Lords stated, in a case in which certain sports facilities for young persons were held to be for the advancement of education and therefore charitable, "the legal conception of charity and ... education, are not static but moving and changing. Both change with changes in ideas about social values."[181] Indeed, the fact that the concept has evolved over time has in part been used to explain the apparent contradictions in the cases. In Gilmour v. Coats,[182] Lord Simonds, in remarking on the great body of law that had grown up around the definition of charity stated "it may appear illogical and even capricious. It could hardly be otherwise when its guiding principle is so vaguely stated and is liable to be so differently interpreted in different ages."[183]

Some commentators also feel that the common law development of the concept of charity has been orderly and rational. The leading Canadian commentators has noted "the courts - left alone to develop the concept of charity - have constantly analogized contemporary activities with the activities of the preamble, and thus kept the law abreast of changing institutions and values in society."[184] The Expenditure Committee in England has noted "The judiciary have interpreted the preamble by extending it by analogy to new purposes as they arise."[185]

Other commentators are of the view that far from tying judges to the past, the form of analogical reasoning they use in this area, which often begins with the preamble to the Statute of Uses, 1601, is pure façade. It is a pretense designed solely to obscure the judge's political judgment about the value of the particular purported charitable purpose before the court in modern society. Alec Samuels has written that "a trust is charitable if a Chancery judge thinks that it accords with contemporary social ideas and policy on public good."[186]

The following is a moderate statement of this view:

> Thus the judge, in deciding charity cases is really making a decision, often of great importance, upon the trend of public policy. He indicates the channels into which private philanthropy can be directed with the greatest effect. In form he may appear to follow earlier decisions, but except where the terms of a later gift are identical with that of a gift in a reported case, his margin of freedom is wide, and it is impossible to exclude the personal factor in the choice between competing analogies.[187]

In this same vein, it has been suggested that the general trends in the judge's decisions reflect prevailing notions about the role of the voluntary sector and the state. To assist in understanding the apparently conflicting cases, the authors of the leading legal treatise on Modern Equity caution that "The policy changes which have been effected by changing social and economic conditions should be borne in mind when considering the cases relating to the definition of charity."[188]

Other commentators have argued that although the judges are unconstrained by legal doctrine in this area, instead of reflecting prevailing notions of the "public benefit" their decisions simply reflect their biases in favor of the propertied classes.[189]

The courts themselves have recognized the justificatory nature of the analogies they make to the preamble of the Statute of Uses, 1601. Russell L.J. in Incorporated Council of Law Reporting for England and Wales v. A.G.[190] remarked, "The Courts, inconsistently saying that not all objects of general public utility are necessarily charitable in law, are in substance accepting that if a purpose is shown to be so beneficial or of such utility it is prima facie charitable in law, but have left open a line of retreat based on the equity of the statute in case they are faced with a purpose (e.g. a political purpose) which could not have been within the contemplation of the Statute."[191] In Scottish Burial Reform and Cremation Society v. Glasgow Corporation,[192] Lord Wilberforce commented (tongue in cheek, perhaps) on what he called the evolutionary process which had taken charity from the "repair of churches" specified in the statute, to maintenance of burial grounds in a church-yard, to a cemetery extended from a churchyard, to embrace, as in that case, the cremation of the dead.

From the above comments, it must be apparent that the common law methodology is quite capable of permitting the concept of charity to evolve. Indeed, as noted, some commentators go so far as to suggest that it does not constrain the judges at all in implementing their view of the "public benefit." (Whether the courts should have the responsibility for developing the concept of charity is a separate question and will be discussed below.) A review of the recent Canadian cases on the definition of charity

further reveals that the courts appear to be adapting the concept to changing conditions.[193]

However, even though the common law concept of charity has been evolving, it is true that the judges continue to justify their decisions by reference to the preamble to the Statute of Uses, 1601. This procedure is clearly anachronistic, if not intellectually dishonest in many cases. The English courts appear to be gradually moving away from this style of reasoning. However, Canadian courts continue to refer to the preamble and often engage in very formalistic appearing decision-making.[194] A case for codification might be made simply to ensure that judges more candidly reveal the true nature of their decision-making process in this area. In the United States and Scotland, for example, the courts never refer to the preamble, and arguably their jurisprudence has developed in a more orderly fashion.

Of course, judges have always resisted making explicit the public policy premises of their decisions. The strongest traditions of the judiciary compel judges to obscure the political nature of their judgments. The courts normally take view that it is for the legislatures to mediate social policy. In part, perhaps this explains the courts reluctance in defining a charitable purpose to abandon altogether the preamble of the Statute of Uses, 1601, the last legislative attempt to define charity. However, a new statutory definition of charitable purposes, even though it might have little effect on their results, might at least render the judges' process of decision-making more frank and understandable.

Of course, few cases involving the definition of charity reach the appellate courts. Therefore, some people have expressed the concern that the courts do not have the opportunity to develop the concept. However, the administrative agencies in both the U.S. and U.K. have expressed their willingness to develop the law at the administrative level. For example, before the House Committee on Ways and Means in 1972, Assistant Secretary of the Treasury for Tax Policy Edwin S. Cohen stated: "We have tried to avoid interpreting the word 'charitable' in a fixed, immutable fashion. As the courts have done in many nontax settings, we have tried to give it a meaning that changes and expands as the needs of society change and expand."[195] Similar sentiments have been expressed in the U.K. by the Chief Charity Commissions.[196] Although there have been no public statements, it is clear that Revenue Canada, following the legal principles adopted by the courts is constantly registering organizations as charitable even though there is no specific case holding the purpose to be charitable and indeed it might not previously have been accepted as charitable.

(b) Predictability

In most areas, the predictability of the applicable law is important. Is it important in this area, and, if so, should the

concept of charity be codified because the common law definition leads to unpredictability?

Although certainty of application is an important attribute of the definition of charity, it can be argued that certainty is not as important in this area of the law as it is in many others. Individuals do not have to rely upon the definition of charity before engaging in conduct which might be detrimental to them if their reliance is unfounded. People wishing to register a charity normally apply to Revenue Canada before they make any serious commitments. If Revenue Canada, or later the courts, finds that their purposes are not charitable they have likely not incurred great expenses or altered their behavior to their detriment. Of course, this is not to say that certainty is unimportant in this area. It serves many purposes, as explained below. However, it is not an overriding concern as it is in other areas of law such as commercial and consumer law.

It seems clear that to the extent that the concept of charity now employed by the courts is uncertain, it is uncertain only in a small number of borderline cases. The concept of charity has a well-understood core meaning. Intuitively this seems obvious. This judgment is confirmed by the fact that in the great majority of cases in which Revenue Canada refuses to register a charity it is not the meaning of the concept of charity that is at issue, but instead its application to the particular facts.

It must also be clear that so long as the definition of charity is left open-ended so that it can evolve with changing social needs and values there will be a margin of uncertainty. Indeed to this extent, the need for a flexible concept is inconsistent with the perceived need for one that is certain of application.

Given the above facts, the question, is, will a statutory definition lead to more certainty than the common law concept of charity but at the same time preserve its flexibility. Will it reduce the relatively small number of doubtful borderline cases?

The common law methodology of applying general principles by analogy to previous cases provides a degree of certainty since in determining whether a purpose is charitable judges can rely upon previously decided decisions. To provide greater certainty presumably the legislative definition would have to be highly detailed. If the legislation only repeated the general principles underlying the common law, no greater certainty would be provided. The courts would have to begin by arguing deductively from these principles. Deductive reasoning from general principles cannot provide much certainty at the level of decision in actual cases. It is precisely here that the method of analogy and precedent must be used to resolve doubtful cases if certainty is to be achieved.

A concern expressed by some commentators is that if a statutory definition is enacted the effect of it might be to render all

existing cases of little precedential value. This, they argue, would lead to a period of great uncertainty, particularly if the legislation was drafted in general language. For example, if concepts such as "beneficial to the community" were used in the legislation without detailed elaboration there would be a large area of indeterminancy. It is the common law built up by the slow accretion of precedents that has supplied determinacy to this area of law. There are countless cases on the degree and nature of the public benefit required for a purpose to qualify as charitable and they constitute an elaborate and relatively stable body of jurisprudence. The Nathan Committee made this point when it noted, "... the law must continue to be judge-made and that it is a complete delusion to suppose that to start with a clean slate would reduce the number of difficult cases or the volume of litigation. On the contrary, the elaborate and expensive process of building up case law would, as it seems to us, start all over again."[197] Of course, this problem might be dealt with by codifying the definition in a way that preserved the common law, but then perhaps little has been gained.

(c) Accessibility

It is sometimes suggested that the law relating to the definition of charities, contained as it is in the facts and decisions of hundreds of cases, is inaccessible. Accessibility is an important interest in an area of the law such as this since non-legally trained persons should be able to determine the application of the law.

Would a statutory statement of the present law increase its accessibility? It is doubtful if a statutory statement of the present law, cast in general terms would do so. Such a general statement would essentially simply restate the classification of charities found in the Pemsel case. That classification is well-known to everyone who works in the area of charity law, is contained in every textbook on the subject, and has been clearly stated by Revenue Canada in "Registered Charities," Information Circular No. 80-10. In terms of accessibility, little would appear to be gained by restating it in the Income Tax Act.

Accessibility might be improved if the holdings of the common law were generalized and restated; however, a statute is perhaps not the place for such detail. In the United States the Internal Revenue Service has somewhat elaborated on the definition of "charity" in their regulations. If accessibility of the common law cases on charity is a problem, presumably a similar kind of distillation of the law might be undertaken by Revenue Canada and published in an Interpretation Bulletin.

(d) Need for a Unique Definition of Charity for Tax Purposes

One of the reasons sometimes given for codifying a common law concept is so that it acquires a meaning unique to a paricular area of law. The concept or charity of charitable purposes is now used in a number of legal contexts. First in trust law if a trust

is charitable it does not have to satisfy all the normal legal conditions of a valid trust. In particular, a charitable trust will not be invalid, unlike other trusts, if it extends beyond the period allowed by the rule against perpetuities or if its terms are uncertain.[198] The great majority of cases involving the definition of charity arise in the context of trust law. Most commonly, a testator will have bequeathed property ostensibly for a charitable purpose. The next-of-kin will challenge the will on the grounds that the trust established is not for a charitable purpose and therefore it is invalid, consequently they should receive the property as residual beneficiaries or under the law of intestate. In Canada, there are only five reported tax cases since 1917 dealing directly with the issue of whether a particular purpose is charitable, while the trust law cases are innumerable.[199]

A second legal context in which the definition of charity is significant relates to the government's role in supervising the administration of charities. The government - the Crown - as part of its prerogative power has always acted as the protector of charities. In England, at least since 1601, there has always been some form of administrative machinery for exercising a supervisory role over the administration of charities. Indeed, the continuing ferment over the role of charities in English society over the last 150 years has largely focussed on the nature of the statutory machinery for supervising charities. It culminated in the passing of the Charities Act, 1960.[200] This Act gives the Charity Commissions broad powers over charities. In Canada the power to supervise the administration of charities is under provincial jurisdiction.[201] Most provinces have not passed any special legislation dealing with the supervision of charities. The common law role of the Crown is normally simply delegated by the Provincial Attorney-Generals to their respective Public Trustees.[202] In Ontario, however, the Charities Accounting Act[203] does provide statutory authority for the exercise of a limited supervisory function over charities by the Public Trustee. In addition to the Charities Accounting Act, there are three other Acts in Ontario directed to charitable organizations and, therefore, under which the definition of a charity might be significant.[204]

In addition to statutes specially directed at charities, most general legislative enactments often create exceptions or deal in some special way with charities. For example, a recent Saskatchewan case involving the definition of charity arose out of an action brought by the Saskatchewan Human Rights Commission. The plaintiff in the action, the Co-operative College of Canada, contended that it was a charitable organization and therefore under their enabling statute the Saskatchewan Human Rights Commission could not proceed with a formal inquiry against them.[205]

Finally, in addition to the Income Tax Act, most taxing statutes provide exemptions for charities.[206] Indeed, recently in tax cases involving the definition of charity it is more likely that an exemption under a municipal real property tax statute will be in issue than a provision of the Income Tax Statute.[207]

If the concept of charity were codified for purposes of the Income Tax Act the courts might well construe the definition at least slightly differently than they would if they were applying the concept as developed at common law. There are two views on whether this would be a positive development.

On the one hand, it can be argued that since the legal consequences that follow from holding a purpose charitable for trust law purposes are different than the consequences that follow from holding the purpose charitable for income tax purposes it makes little sense that the same definition should apply in each area of the law. For example, in determining whether a purpose is "beneficial to the community" and therefore charitable, the decision-maker must make an assumption (usually implicit) about how beneficial the purpose must be before it will be held to be charitable: "beneficial to the community" is clearly a standard that admits of an almost infinite number of degrees. In trust law presumably the implicit degree of benefit that must be obtained is one that would justify permitting property to be devoted to the particular purpose in perpetuity. In tax law, on the other hand, the public benefit should be of such a degree that would justify granting a tax exemption to an organization having such a purpose and a tax deduction to donors for their contributions to the organization.[208] In theory at least, because of the degree of public benefit it provides, a purpose might qualify as a charity for trust law but not tax law.

A practical reason for applying a different definition of charity in trust law than in tax law is that not to do so tends to distort legal decision-making. In trust law cases where the validity of a purported charitable testamentary trust is challenged by the next of kin the courts will generally wish to resolve doubtful cases in favor of the charity so that the obvious intentions of the testators are respected. However, they might be dissuaded from doing so because of the fiscal consequence of their decision. If they do uphold the trust then, of course, purposes in which the state has very little interest will be granted tax concessions. Generally, to the extent one can generalize, in trust law cases judges tend to construe the definition of charity liberally, while in tax law cases they tend to construe it more restrictively.[209] Separating these consequences of holding a trust charitable will give judges room to engage in more rational decision-making. The sense of this can be appreciated simply by observing that there is inevitably a tension when two quite disparate consequences follow from one decision, of any kind.

In 1956 Geoffrey Cross, then a legal academic, argued strongly that for these latter reasons a separate definition ought to be given to the concept of charity for trust and tax law purposes.[210] Fifteen years later, then a member of the House of Lords, he returned to this theme. In a leading case on the definition of charity for trust law purposes in which the House of Lords held that an educational trust for employees of a particular employer was not charitable because it was not for a public purpose, Lord Cross explained that decisions upon which the court's

holding were based were "pretty obviously influenced by the consideration that if such trusts as were these in question were held valid they would enjoy an underserved fiscal immunity."[211] Most legal commentators would agree with Lord Cross' observations.[212] However, it is interesting to note that three Law Lords expressly disassociated themselves from them.[213] For example, Lord MacDermott, with Lord Hodson, doubted "if these consequential privileges have much relevance to the primary question whether a given trust or purpose should be held charitable in law."[214]

Even though applying the same definition of charity in different areas of the law may distort decision-making, and in principle one can argue the definition of charity should be different for trust and tax law purposes, the necessity of having a different definition in each area can be easily overstated. Presumably, in the great majority of cases, even given that different consequences follow, a particular purpose even in principle would be held charitable or not both in trust and tax law. And the borderline cases are not likely to be significant. Furthermore, in trust law the purposes at issue are not often likely to involve generally recurrent factual patterns, and thus can easily be restricted to their facts. That is to say, in a trust law case if a judgment is made that the disputed purposes are charitable and therefore the trust is not invalid because of the rule against perpetuities, although that particular trust will receive tax advantages, in most instances the case will be able to be confirmed to its facts and thus not serve as general precedent for future cases.

In favor of one definition of charity for trust and tax law purposes, it has been argued that it would be inconvenient to have a definition of charity for tax law purposes that was different than that used for all other purposes. Among other things, it might mean that an organization would have to have its status determined by a number of different tribunals. George Keeton, a leading commentator on the law of charity has gone so far as to assert, "It is desirable, if not essential, to preserve a single definition of charity, whether it is being considered from the standpoint of the general law, of rating law, or of taxation."[215]

However, this argument for not having separate definitions can also be overstated. In some countries the concept of charity has acquired different meanings in various branches of the law.[216] Furthermore, even under the present practice an organization might be accepted as charitable by one administrative agency for one purpose, but find its status denied by another. Finally, since only borderline cases will be affected the inconvenience is not likely to substantially effect the operation of the voluntary sector.

The point of this section of the paper has been that in deciding whether to codify the concept of charity for tax purposes one should consider the extent to which such codification is likely to result in the concept having a different meaning in tax law than in other areas, and also consider whether this is a good or

bad thing. The discussion can perhaps be concluded by observing that the arguments one way or the other do not seem particularly compelling.

A related matter should be mentioned here. The federal government has not passed any statute aimed specifically at supervising the administration of charities. However, charitable organizations may incorporate, like any other non-profit organizations, as corporations without share capital under the Canada Corporations Act.[217] Under the present Canada Corporations Act all non-profit corporations are subject to the same rules, whether they are charitable or not. However, over the past five years the federal government has introduced into the House of Commons and Senate, on at least three different occasions, a Bill to pass "An Act respecting Canadian non-profit corporations."[218] Most recently such a bill, Bill C-110, was given first reading on April 16, 1980.[219] Unlike the present Canada Corporations Act, Part II, which deals with corporations without share capital, the proposed Act deals comprehensively with non-profit corporations.

To achieve its purposes the proposed Act provides for two types of not-for-profit corporations: "charitable corporations" and "membership corporations."[220] A "membership corporation" is defined as a corporation incorporated "for a non-pecuniary purpose or purposes primarily for the benefit of the membership." Thus it includes social, fraternal or professional corporations formed primarily for a private non-pecuniary purpose.[221] A "charitable corporation" is defined as a corporation incorporated "to carry on activities that are primarily for the benefit of the public." Since by definition, the public has a greater legitimate concern with respect to "charitable corporations" than "membership corporations," generally the proposed legislation provides that "charitable corporations" will be subject to more regulatory supervision than "membership corporations."[222]

If the proposed "Not-for-Profit Corporations Act" is passed then, as mentioned above, a charitable corporation for the purpose of the Act will be defined as a corporation incorporated "to carry on activities that are primarily for the benefit of the public." This definition is considerably broader than the definition for tax purposes.[223]

If a definition is enacted in the Income Tax Act some consideration should be given to any difficulties that may arise because of two slightly different definitions of charity in federal legislation. Of course, there is nothing illogical about such a position. The policy reasons for the concept of a "charitable corporation" in corporation law are quite different than the policy reasons for such a concept in tax law. And even if a new statutory definition is not enacted in the Income Tax Act, but the not-for-profit corporations bill is passed, the definition for tax and corporation law purposes will presumably be different in any event. Perhaps to the extent there is any risk of confusion by

having two definitions, it was unfortunate that the term "charitable corporation" was used in the proposed corporations bill instead of, for example, "public purpose corporations."[224]

B Reforming the Definition of Charity

Whether the concept of charity should be codified is a question that is distinct from the question of whether it should be changed (even though many of those who phrase their argument in terms of codification appear to do so only because they wish to expand or restrict the definition). If the common law concept of charities does not embrace particular purposes that should be held charitable, or extends to purposes that should not be held charitable, then of course some kind of statutory amendment is required. However the statutory amendment could be very specific. For example, if the intention was to extend the tax concession to purposes not now held to be within the concept of charity, these purposes could be simply listed in the relevant paragraph of the Act, in the same way that, for example, registered Canadian amateur athletic associations were listed.[225]

To determine whether the common law concept covers all and only those activities that the government wishes to treat as charitable for tax purposes would require not only a clear articulation of the relevant principles but also a detailed examination of all those organizations that wish to register but are unable to because they have been held not to be charitable and all those now engaged in charitable purposes. Such an examination will not be undertaken in this paper because it would require a substantial amount of empirical research and because of the large political element of such an exercise.

If the present law is expanded to embrace purposes not now covered there would likely be revenue consequences. However, the extent of these consequences would be difficult to predict. First, it would require an estimate of how many new organizations would register under the expanded definition and the amount of the contributions they would receive and how many existing registered organizations would broaden their activities and thereby increase the amount contributed to them. Second, it would require an estimate of how much of these contributions would be amounts that donors would have otherwise contributed to listing charities and how much would not have been so contributed or would not have been in some other way sheltered from tax.

The efficiency of the tax deduction for charitable contributions is open to question. That is to say, even if the tax deduction for charitable contributions were repealed it is not clear that the present level of gifts to charities would decline significantly.[226] However, if a broad range of organizations are entitled to receive tax-deductible contributions, but others are not, it seems highly probable that those that cannot receive tax deductible contributions would have more difficulty raising funds. But, the point is, that if they become entitled to register it is also highly probable that instead of attracting only

funds that would otherwise not have been contributed to charities, they would attract a certain amount that would otherwise have been donated to existing charities.

C Drafting a Definition of Charity

If a definition of charity is to be drafted, aside from its substantive content, two fundamental questions of policy would have to be made. (1) How detailed the definition should be? (2) Which tribunal should adjudicate contexted cases? Both of these issues will be discussed briefly. Then to provide illustrations of the various forms that the drafting might take, proposed statutory definitions and those enacted in other jurisdictions will be referred to. These statutory definitions are set out in various appendixes to this chapter.

1 Detailed Rules or General Principles[227]

If a definition of charity is to be enacted, from the point of view of formulating the definition, one of the most important decisions to be made will be whether to draft the definition in general or in specific terms. At one extreme the definition might simply provide, for example, that all purposes "beneficial to the community" are charitable. At the other extreme the definition might be comprised of a detailed listing of specific types of purposes that will be held to be charitable, or perhaps going so far as to list the qualifying organizations. In choosing a definition anywhere along this specificity - generality continuum the costs and benefits of a general or more specific definition have to be evaluated.

The most important benefit of a precise definition is that it increases certainty in applying the law. It was suggested above that since individuals do not likely order their affairs on the basis of the legal definition of charity, certainty is not an overridding concern in this area. However, this attribute of a statutory enactment is not unimportant even here. Certainty of application would: reduce the expense incurred by organizations in organizing around and disputing doubtful charitable purposes; reduce the general public's need to rely upon expert advice to advise on compliance with the law; reduce the arbitrariness of decisions made by Revenue Canada and the courts; and, reduce Revenue Canada's costs of enforcement.

But, although detailed statutory rules increase the certainty of the law they do have a number of costs. One such cost is simply the time and resources consumed in attempting to formulate rules at the legislative level. Particularly, if the subject-matter of the rules effect the interests of a number of different government departments, and there is likely to be considerable interest group activity, formulating detail rules at the legislative level can be a time-consuming and expensive process. Another cost of detailed statutory rules is that they can never perfectly implement the broad principles underlying them. Invariably, individual cases will arise which are within the principle but not the

detailed rules or that are able to fit within the detailed rules but to which the underlying principle would not apply. This problem of over- and under-inclusiveness is a cost that normally must be born to achieve certainty of application. A final cost of detailed rules is that they generally cannot accommodate change. Thus, if the concept of charity evolves over time fairly rapidly as new social needs arise or values change, the guidelines may become obsolete.

In some cases these last two costs of detailed rules can be reduced by the use of drafting techniques, such as backing up the detailed rules with an overriding principle or stating the general principles and then using detailed guidelines or specific rules as illustrations, or general or normal applications of the principle.

The above analysis was framed as if the choice was between a general or detailed definition of charity. However, since detailed rules will have to be formulated or deducted from the general principles in resolving particular cases, the choice may be more accurately phrased as a choice between which agency of government should be given responsibility for formulating the detailed rules - Parliament, the Executive, or Revenue Canada and the Courts.

If Parliament is deemed to be the most appropriate body to formulate the detailed rules then of course the detailed rules must be contained in a statutory enactment. If such detailed rules should be formulated by the executive then Parliament should simply enact a general principle and delegate the authority to the Minister of Finance to prescribe regulations defining charitable purposes. If, finally, Revenue Canada and the Courts are deemed to be the appropriate body to formulate detailed rules, then Parliament should simply enact a general principle and leave its interpretation to the Courts. In this event, since so few cases reach the Court, realistically it will be Revenue Canada by ruling on individual applications, subject to sporadic review by the Courts, that will in effect formulate the detailed rules. Of course, Revenue Canada might from time-to-time give some coherence to this body of rulings and jurisprudence by issuing an Interpretation Bulletin in which it sets out its general practice and interpretation of the law.

Deciding which decision-making authority should formulate the detailed rules involves a consideration of a number of factors.

The advantage of having the detailed rules enacted as legislation is that Parliament retains control over them. This is particularly important where the general principle is relatively open-ended - such as the principle of "purposes beneficial to the community" in defining charity - and the formulation of detailed rules requires important political judgments. On the other hand enacting detailed rules in legislation can be time-consuming and relatively inefficient, particularly if the legislation is complex and a number of government departments and interest groups are involved. Furthermore, if the law is likely to require constant

changing, since Parliament's attention to problem is invariably sporadic it will generally be inappropriate for it to formulate the details.

Enacting a broad standard in legislation and delegating regulation-making authority is often a convenient technique of rule-making. The case for such delegation is strongest where the rule-making is very detailed and requires specialized knowledge. This is of course, the traditional justification for the transfer of subordinate legislative authority to administrative agencies. If such rule-making authority is delegated in the Income Tax Act, the Department of Finance will be primarily responsible for drafting the rules.

Finally, if a broad standard is enacted but no authority to prescribed regulations given to the Department of Finance then the courts will have the authority to ultimately determine the detailed rules. However, since Revenue Canada makes the initial determination of whether to register an organization as charitable, and few cases are appealed to the courts, Revenue Canada will effectively provide the necessary elaboration of the general standard. Revenue Canada might do this simply by adjudicating individual cases and eventually establishing a practice that becomes known among those who normally deal with it or it might issue an Interpretation Bulletin in which it rationalizes the law and states its practice. The advantage of delegating, in effect, rules-making power to the courts is that the precedential value of existing case law can be retained. In addition, the courts can apply the underlying principles to new social needs as they arise.

An important disadvantage of delegation to the courts is that decisions in individual cases might be made without a systematic hearing of the evidence as to the potential benefits of a particular purpose, and also since individual cases will establish principles that will be followed in future cases, all interested parties will not be heard. An important advantage of delegating rule-making authority to the Department of Finance is that notice can be given to all interested persons when new regulations are issued and all comments can be received and considered.

2 Courts or a Specialized Tribunal

No matter how detailed a statutory definition or no matter how profuse the decisions in individually adjudicated cases, there will continue to be gaps and ambiguities in the definition of charity. In the discussion above it was assumed that ultimately it would be the courts that fill these gaps or resolve these ambiguities in individual cases. However, it is not necessary, or perhaps even desirable, that the courts act as the ultimate arbiters in deciding what purposes are charitable. An administrative tribunal whose members were appointed by the federal government could act as final adjudicator. The exact form of this tribunal and kinds of persons appointed to it could vary considerably. The details of its possible procedures and potential members will not be discussed here. In outlining some of the

considerations that should be taken into account in deciding whether the courts or a specialized tribunal should ultimately determine whether a purpose is charitable it will be assumed that the administrative tribunal would have members who have or would develop some expertise in the functions and administration of the voluntary sector.

Numerous commentators have suggested that a specialized tribunal should be appointed to determine the issue of whether particular purposes are charitable for tax purposes; however, most who raise the issue are equivocal.[228] Nightengale, for example, appears to favor leaving the question of what is a charity to a specialized tribunal, but he goes on to express caution:

> It would be foolish to underestimate the difficulties a tribunal would face, however informed it members, and however representative of donors, recipients, and the social services. It would still have to interpret 'purposes beneficial to the community' or something of the sort. How far would, and should, it favor (say) pressure-groups catering for minorities are not yet well-established?[229]

George Keeton, the leading English commentator on the law of charities, developed over a number of years reservations about sending the issue to a specialized tribunal. In the first edition of his book The Modern Law of Charities he appeared to favor the appointment of a specialized tribunal. He concluded:

> It is a matter for serious consideration whether the jurisdiction to decide what is, and what is not a charity should be removed from the ordinary courts completely, and given to a special administrative tribunal, which will act upon a definition drafted in broad terms, and embodied in an Act of Parliament.[230]

However, nine years later, when he co-authored the second edition of his book with L.A. Sheridan, he expressed the reservation that "it cannot be taken as demonstrated that, faced with identical legislation, administrative tribunals interpret it more closely in line with the policy of Parliament than do the courts."[231]

Whether a court or a specialized tribunal should ultimately adjudicate the question of whether a particular purpose is charitable should be resolved by a consideration of the following factors:

1. Whether the method of reasoning adopted by, and the institutional characteristics of, the courts are well-suited to resolving the kind of questions raised in the adjudication of cases involving the definition of charity.

The courts are well-suited to resolving disputes by analogical reasoning and where all the relevant facts and considerations of policy are likely to be presented by the parties appearing before it. Where the resolutions of the issues presented is likely to require expertise or specialization or is likely to require the investigation of broad societal facts the courts are a less well-suited forum.

If an open-ended definition of charitable purposes is provided, such as "purposes beneficial to the community," the adjudicating tribunal could be called upon to make difficult findings about broad societal facts. For example, a commentator on a Canadian case holding that community centres were not "charitable" stated that in deciding whether community centres are charitable.

> We need to know more of the nature and function of community centres in Canada, the role of public funds and private gifts in their creation and support, the significance of community self-help in different kinds of communities, and the overall claims that community centres might legitimately make to relief, directly and indirectly, from the various forms of taxation.[232]

These kinds of questions could be asked about virtually all purported charitable purposes in determining whether they were "beneficial to the community" and thus should receive a tax concession. Clearly courts are inappropriate forums for making findings on broad societal facts such as these.[233] The determination of the importance of current social needs also involves value judgments. Clearly judges are not experts in determining current welfare needs nor are they trained social policy-makers.

Also, it might be argued that because of the large public interest involved in individual adjudications of what is a charity, the determination should be made by specialists. They would be able to perceive the implication of individual cases in a wider context than judges could.

On the other hand, the great majority of cases in which the definition of charity is disputed likely do not involve a critical and in-depth examination of current social welfare needs. Most cases involve purely factual type questions such as whether there is too large an element of self-interest present in the organization's purposes to qualify it as a charity. These are the kind of questions that judges are skilled at dealing with and that the rules of court procedure are designed to accommodate. Even when a question of whether a particular purpose is "beneficial to the community" arises the situation is very seldom likely to be so novel that analogical reasoning and informed intuition will not be as likely to lead to a correct answer as a full-scale investigation of current social welfare needs.[234]

2. Whether prevailing political doctrine should be considered in the detailed rule-making.

The courts tend to be more insulated from prevailing political doctrine than administrative tribunals.[235] Judges are, for example, appointed for life and thus do not need to be concerned about the favor of dominant politicians.

Arguably the definition of charity should be as free from the political pressure and prevailing political ideologies as possible. If the decision is subject to too much political pressure, or if the test of social utility is defined by prevailing political beliefs, then much of the traditional justifications for the voluntary sector - to act as a countervailing force to the state and an independent center for pioneering social activity - is undermined.

On the other hand it has been argued that the definition of charity is so inherently political that its political nature ought to be made explicit. An English commentator has suggested that:

> the only solution is to recognize that it (the definition of charity) is an area which is predominantly public administration, not private law, and that since in any society we can peaceably predict, the state will be intervening in a way scarce dreamt of when its ground rules were laid down, it cannot avoid political controversy. We should give serious consideration to taking it away not just from the chancery, but from judges altogether and, further, removing the control of judge-made precedents. We should recognize the dominance of its social and political content by entrusting it to a body directed to take these factors into account, and so destroy its present characterization as a private inter partes affair. It would not at this time perhaps even be unacceptable to vest control in a politically appointed body, answerable to political masters and changing with the fortunes at Westminster.[236]

3. Whether judges are likely to be sympathetic to the broad social purpose to be achieved.

Judges, because of the selection process or through training as lawyers, tend to acquire a peculiar set of political and other biases. The justification given for referring a number of issues to administrative tribunals has been that judges as a group were not sufficiently sensitive to the declared policies of Parliament. The question here is whether judges have revealed any systemic biases that should disqualify them from determining whether particular purposes are charitable.

4. Whether the pre-trial procedures and the trial-type hearing provided by the courts are necessary.

Court procedures tend to be prolonged, technical and, because they generally involve the necessity of lawyers, expensive. The adjudication of some issues do not require this type of procedure. In particular, if it is unlikely that historical facts relating to the parties will be an issue, or that a complex body of jurisprudence will require rationalization, a much simpler procedure might be possible.

5. Whether the adjudicative body should have functions other than the adjudication of individual disputes.

Judges adjudicate individual cases presented to them and then likely never return to the issue again. If it is desirable for the adjudicative body to be able to initiate action, to exercise continuous expert supervision, or to be able to formulate broad policies then the courts are clearly not a suitable tribunal.

In addition to the above consideration, in deciding whether a court or a specialized tribunal should adjudicate the issue of whether particular purposes are charitable a number of considerations relating to the establishment of a tribunal should be considered: who would be appointed and what procedures would be followed; whether it is practical to establish a tribunal to deal only with disputed cases related to the definition of charity, that is, would there be a sufficient number of cases and would the task be one that adjudicators could perform over an extended period of time; would the tribunal have to undertake other tasks in order to ensure the adjudicators acquired or retained a broad perspective in relation to their work; would the tribunal tend to become biased in favor of segments of the voluntary sector, or the voluntary sector generally; what jurisdictional issues would be raised by the appointment of a tribunal to deal with issues relating to charities; and how the administrative machinery might be established to ensure the correct balance of independence and political accountability.

D Illustrations of Attempts at Codification

It seems self-evident that a serious attempt to codify the definition of "a charity" for tax purposes would begin with a clear articulation of the reasons why the government wished to subsidize certain organizations by means of the matching grant system inherent in the tax deduction. Once these reasons were articulated a definition could be fashioned that would ensure their implementation.

Most frequently, the tax deduction for contributions to charitable organizations is defended on the functional grounds that, although stated in a variety of ways involves a chain of reasoning that contains three factual premises.[237]

That charitable organizations are providing public goods and services that the government itself would otherwise have to provide. (But this does not tell us why charities should provide these goods and not the government itself.)

That encouraging charitable organizations instead of the government to provide these services promotes altruism, diversity and experimentation, and provides for the delivery of these services in a way that is often less expensive, more responsive to local needs and more humane than if the government itself had provided them. (But this does not tell us why the government should subsidize these activities indirectly by means of a tax deduction for contributors instead of in some other way.)

That subsidizing charitable organization by means of a tax deduction promotes pluralism and ensures that there will be no government assessment or intervention, direct or indirect, in their activities, and such non-intervention is necessary if they are to achieve the objectives mentioned above.

Even assuming that agreement could be reached on a series of premises, such as the above, justifying the tax deduction for contributions to charities, there are obvious difficulties with them attempting to deduce from them a definition of charity. Although a core meaning could probably be agreed upon, at the margins little or no agreement could likely be reached. Also it is unlikely that the core meaning would look very different than the meaning attached to the term in ordinary or present legal usage. Likely for these reasons, no one has attempted an exhaustive definition for charity explicitly based upon the rationales for subsidization. Instead most drafters have been content to restate the common law definition in various degrees of detail.

In Canada, where the concept of charity has been codified the categorization in Pemsel's case has simply been restated. For example, in Ontario the Mortmain and Charitable Uses Act[238] provides that, "The following shall be deemed to be charitable uses within the maining of this Act (a) the relief of poverty, (b) education, (c) the advancement of religion, and (d) any purpose beneficial to the community, not falling under the foregoing heads."

However, in Canada the National Voluntary Organizations has proposed a statutory definition of charity, and in other jurisdictions various attempts have been made to codify the concept. These proposed or statutory definitions are set out in various appendices to this paper. Some of these definitions are simply an elaboration of the categories in Pemsel's case; for example, the definitions proposed by the National Voluntary Organizations (Appendix 1.), Brumgate, a legal scholar (Appendix 2), and the American Law Institute in their Restatement of the Law of Trust

(Appendix 3). Others are comprised of a detailed list of charitable purposes, analogous to the preamble of the Statute of Uses, 1601, but more detailed and updated; for example, the definitions proposed by the Report on Charity Law and Voluntary Organizations (Goodman Report) (Appendix 4), Keeton and Sheridan, legal scholars (Appendix 5), and the definition contained in the United States Internal Revenue Code, Regulations (Appendix 6). Finally, in Australia those organizations that qualify to receive tax deductible contributions are specifically mentioned in the Australian Income Tax Assessment Act (Appendix 7).

FOOTNOTES

1. All references in this paper to the Income Tax Act or simply the Act, are to the Income Tax Act, R.S.C. 1952, c. 148, as amended by 1970-71-72, c. 63. unless otherwise noted.

2. Para. 110(1)(a). All references in these footnotes to statutory divisions will be to enactments in the Income Tax Act, unless otherwise noted.

3. The literature on this issue is voluminous. See most recently, Berman and Waitzer, "Public Policy and the Tax Treatment of Philanthropy," (1982-83) The Philanthropist (Winter) 2; Goodman, "Proposed changes in the Tax Credit System," (1982-83) The Philanthropist (Winter) 13.

4. All references in this paper to statutory divisions will be to enactments in the Income Tax Act, unless otherwise noted.

5. For a discussion of these rules see Brown, "Tax Treatment of Charities," 1 The Philanthropist (N° 2) 3 (1977-80); Brown and Dickson, "A Kaleidoscopic View of the Charity Amendments," 2 The Philanthropist (N° 2) 14 (1977-80; Panel Discussion, "Income Taxation of Charities - 1976 Amendments," in Canadian Tax Foundation, Report of the Proceedings of the Twenty-Eighth Tax Conference (1976), p. 149. See also J.J. Coombs, Charities and Charitable Donations: An Evaluation of Canadian Tax Treatment (Don Mills, Ontario: CCH Canadian Limited, 1978) and A.B.C. Drache, Canadian Tax Treatment of Charities and Charitable Donations, 2nd ed. (Toronto: Richard De Boo Limited, 1980).

6. Department of Finance, Discussion Paper: The Tax Treatment of Charities (Ottawa, 1975).

7.

8. H. of C., Debates, June 18, 1971, p. 6895.

9. See supra note 6.

10. National Advisory Council on Voluntary Action, People in Action (Ottawa: Supply and Services, 1978).

11. For a description of their concerns, efforts and proposals see Morrison, "Redefining 'Charities' in the Income Tax Act," (1982-83) The Philanthropist, (Winter) 10.

12. See various speeches of the Minister.

13. See Chapter II of this paper.

14. Para 149 (1)(1).

15. Para. 110(1)(a) provides that within limits, a taxpayer can deduct contributions made to the following organizations: (i) registered charities, (ii) registered Canadian amateur athletic associations, (iii) housing corporations resident in Canada and exempt from tax under this Part by paragraph 149(1)(i), (iv) Canadian municipalities, (v) the United Nations or agencies thereof, (vi) universities outside Canada prescribed to be universities the student body of which ordinarily includes students from Canada, and (vii) charitable organizations outside Canada to which Her Majesty in right of Canada has made a gift during the taxpayer's taxation year or the 12 months immediately preceding that taxation year.

16. Most organizations applying for registration under the Income Tax Act are organizations incorporated under the special provisions in the relevant corporations act for the incorporation of not-for-profit or non-share capital corporations. See People in Action, supra note 10, pp. 216-22; D.W.M. Waters, Law of Trusts in Canada (Toronto: Carswell, 1974), p. 420. Prior to 1972 there was apparently some doubt as to whether a trust could register as a charitable organization under the Income Tax Act. However that doubt has been removed. See Waters, supra note 16, p. 447.

17. Subpara. 110(1)(a)(i).

18. See infra, note 20-24.

19. For a further discussion of their precise meanings see Waters, supra note 16, p. 420-21.

20. Para. 149.1(1)(d).

21. Subpara. 110(8)(c)(i).

22. Para. 149.1(1)(b).

23. Para. 149.1(1)(a).

24. "Charitable purposes" are defined as including "the disbursement of funds to qualified donees," para. 149.1(1)(c). "Qualified donee" is defined to include registered charities, para. 149.1(1)(h).

25. The common law meaning of charitable activities is extended, in effect, in the Act by subsection 149.1(6) to make it clear that it includes carrying on a related business, providing funds (to a limited extent) to other registered charities, and providing funds to an associated registered charity. By virtue of subsection 149.1(10) it is also extended to include paying an amount out of capital to another registered charity.

26. The Commissioners for Special Purposes of the Income Tax Act v. Pemsel, (1891) A.C. 531 (H.L.).

27. The Income War Tax Act, 1917, 7-8 Geo. V., c. 28.

28. C.P. Plaxton and F.P. Varcoe, A Treatise on the Canadian Income Tax Act (Toronto: Carswell Co, 1921), p. 178.

29. The use of the term "institution" in the definition did, however, have the effect of rendering the most common form of charitable organizations, charitable trust, taxable. In a series of cases the courts held that a "charitable institution" did not include a charitable trust. See M.N.R. v. Trusts and Guarantee Company (Bertwistle Trust) (1940) A.C. 138, 1 D.T.C. 499-64 (P.C.) and Burns Estate v. M.N.R. (1950) A.C. 213, (1950) C.T.C. 393 (P.C.). It was also not clear that the term "charitable organization," which was used when the section was amended in 1948, see infra note 30, included a charitable trust. See Waters, supra note 16, p. 447, n. 27. In 1950 the Act was amended by the addition of a section that explicity exempted from tax charitable trusts that were used as foundations, e.g., grant-making charitable organizations, and subjected them to certain pay-out requirements. In introducing the measure the Minister of Finance, the Honourable Mr. Abbott, stated that "in the past it is questionable whether these organizations have been clearly entitled to the exemption" and "there has been an opportunity for abuse in the case of these charitble foundations." H. of C., Debates, May 18, 1950, p. 2618. Since 1972 an "organization" has been defined as including a trust. Para. 110(8)(c).

30. Para.57(1)(e) of The 1948 Income Tax Act, 11-12 Geo. IV., c. 51, provided for the exemption from tax of "an organization operated exclusively for charitable purposes or an agricultural organization, a board of trade or a chamber of commerce and no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof".

31. Subsec. 2(b) of Bill N° 310, to amend the Income War Tax Act, reproduced in H. of C., Debates, May 24, 1930, p. 2512.

32. See H. of C., Debates, May 24, 1930, pp. 2512-19.

33. Id., pp. 2514.

34. H. of C., Debates, May 28, 1930, pp. 2714-15.

35. Id., pp. 2714-15.

36. Id. p. 2715.

37. The history of the development of the concept of charity is traced in detail in; G. Jones, History of the Law of Charity, 1532-1827 (London: Cambridge University Press, 1969); W.K. Jordan, Philanthropy in England 1480-1660 (New-York: Russell Sage Foundation, 1959); D. Owen, English Philanthropy 1660-1960 (Cambridge: Belknap Press, 1964). A shorter

summary can be found in M. Chesterman, Charities, Trusts and Social Welfare (London: Weidenfeld and Nicolson, 1979), chs. 2,3; G.W. Keeton and L.A. Sheridan, The Modern Law of Charities 2d ed. (Belfast, Northern Ireland Legal Quarterly, Inc., 1971) ch. 1; Report of the Committee on the Law and Practice relating to Charitable Trusts (Nathan Committee) Cmd. 8710 (London: HMSO, 1952), pp. 15-16; B. Whitaker, The Foundations (Harmondsworth: Penguin Books), ch. 21. The following historical overview draws upon these sources.

38. See G. Spence, The Equitable Jurisdiction of the Court of Chancery (Philadelphia: Tea and Blanchard, 1846), vol. I, pp. 585 ff.

39. Statute of Charitable Uses, 1601, 43 Eliz., c. 4. The statute was apparently drafted by a committee of people including Francis Moore who shortly thereafter wrote extensively about its purposes. See Jones, "Francis Moore's Reading on the Statute of Uses," (1967) Cambridge L.J. 224. For a suggestion that the preamble was largely copied from a passage of William Langland's The Vision of Piers the Plowman, written over 200 years earlier, see Moe, "The Vision of Piers Plowman and the Law of Foundations," 102 Proceedings of the American Philosophical Society 371 (1958).

40. For a short description of the social and economic context of the Statute of Uses, 1601 see W.S. Holdsworth, A History of English Law (London: Methuen Co., 1924) Vol. 4, pp. 387-402.

41. See infra notes 49-51.

42. (1805), 10 Ves. 522; 32 E.R. 947 (Ch. Ct.).

43. Id., at 523; 32 E.R. at 948.

44. (1805), 9 Ves. 399, 400; 32 E.R. 656, 657 ( ).

45. Id., at 405; 32 E.R. at 658-59.

46. Supra note 42, p. 532 E.R. at 951. To anticipate a matter than will be discussed below, it is interesting to note that in arguing that charitable purposes could not be equated simply with public benefit Romilly gave examples of a number of purposes that might be for the benefit of the public but which would clearly not be held charitable:

> There are various instances of liberality, that cannot be described as charity: the establishment of Cabinet of Natural History, Anatomical Exhibitions, Galleries of Pictures, to be open to the public: legacy to the African Society, for acquiring information in the interior of Africa to contribute to raise the degraded state of society in that part of

the world; all these are instances of liberality; but not charity. (Supra note 42, p. 533; 32 E.R. at 950-51.)

Today all these purposes would likely be held to be charitable.

47. Infra. note 60.

48. Supra note 42, p. 541; 32 E.R. at 954.

49. See M. Chesterman, Charities, Trusts and Social Welfare (London: Weidenfeld and Nicolson, 1979), p. 55.

50. See G. Jones, History of the Law of Charity. 1532-1827 (London: Cambridge U.P., 1969), p. 109.

51. Id., p. 116-17.

52. Jones, supra note 50, p. 116-117. Lord Nothington's attitude is reflected in a statement in Att. Gen v. Tyndall ((1764) Amb. 615, 616, 27 E.R. 399, 340 (Ch. D.)) where Lord Henley asserts that it "is indifferent to the donors in what species of charity they give their money: not service to the poor but vanity is their motive."

53. See generally D. Owen, English Philanthropy 1660-1960 (Cambridge: Belknap Press, 1964), pp. 330-335; Chesterman, supra note 49, pp. 58-62; "Memorandum by the Board of Inland Revenue on the Subject of the Exemption from Income Tax Enjoyed by Charities," in Sixth Installment of the Minutes of Evidence, Royal Commission on the Income Tax (London: HMSO, 1920), Appendix No. 31.

55. Income Tax Act, 1979, 39 Geo. III, c. 13, s. 5.

56. 43 Geo. III, c. 122.

57. 5 & 6 Vict., c. 35.

58. But see Owen, supra note 53, p. 330: "We can only guess as to the motives that inspired Pitt to include in his Income Tax Act of 1799 a clause exempting charitable organizations, but it was a natural enough decision. To take a single example, grammar schools and free schools were carrying the entire burden of popular education and thus performed a public function of incontestable value. It would have been preposterous to tax the income of such quais-public agencies (footnote omitted)."

59. The following exerpt from his Financial Statements of 1863 summarizes his concerns, "if we have the right to give public money, we have no right to give it in the dark. We are bound

to give it with discrimination; bound to give it with supervision; bound as a constitutional Parliament, if the Hospitals are to receive a grant, to bring them within some degree of control." Quoted in D. Owen, supra note 53, p. 331.

60. In his speech in Parliament, Gladstone noted that following his argument in his Financial Statement of 1863, he was struck "by the skillful manner in which the charitable army, so to call it, has been marshalled." Quoted in D. Owen, supra note 53, p. 332.

61. (1891) A.C. 531 (H.L.).

62. (1888), 15 Sess, Cas. (4th Series) 682 (Ct. of Sess., 1st Div.).

63. (1888), 22 Q.B.D. 926 Lord Coleridge, C.J. felt bound by Bairds' Trustees, id. The other judge who heard the case in the Court of Appeal, Grantham, J., felt that the interpretation of the statute in Bairds' Trustee was too narrow; however, he withdrew his decision because the court was equally divided.

64. Supra note 61, p. 568.

65. Supra note 61, p. 591.

66. Supra note 61, p. 583.

67. See supra note 42.

68. Basically, the courts of virtually all commonwealth countries use the same methodology in determining whether a particular purpose is charitable. And in Canada the courts will frequently cite and rely upon decisions from other commonwealth countries, particularly of course decisions of the courts of the United Kingdom. The American courts also apply the common law definition of charity and their decisions are usually discussed under the same headings as decisions from commonwealth courts. However, American courts do not feel as bound as Canadian courts to refer to the categories set out in Pemsel's case or to the preamble to the Statute of Uses, 1601. Therefore they are seldom cited by Canadian courts. However, the principles applied are basically the same. The leading discussions of the law are cited below for each major jurisdiction:

Canada: Oosterhoff, A.H., Cases on the Law of Trusts (Toronto: Carswell, 1980) ch. 6; Smith, B.G., Introduction to the Canadian Law of Trusts (Toronto: Butterworths, 1979), ch. 6; Waters, D.W.M., Law of Trusts in Canada (Toronto: Craswell, 1974), pp. 460-515; "Charities," (Ontario) 4 C.E.D. 3rd ed. (Toronto: Butterworths), title 24; "Charities," (Western) 5 C.E.D. 3rd ed. (Toronto: Butterworths), title 24.

England: Annual Charity Appeals Supplement of the Solicitor's Journal; Annual Charities Review of the New Law Journal; Chesterman, M., Charities, Trusts and Social Welfare (London: Weidenfeld and Nicolson, 1979), ch. 7; Clark, J.B. Theobald on Wills, 14th ed. (London: Stevens and Sons, 1982), ch. 35; Hanbury, H.G., and R.H. Maudsley, Modern Equity (London: Stevens and Sons, 1981), ch. 17; Hayton, D.J., Nathan and Marshall Cases and Commentary on the Law of Trusts, 6th ed. (London: Stevens and Sons, 1975), ch. 6; Keeton, G.W., and L.A. Sheridan, The Modern Law of Charities, 2nd ed. (Belfast: Northern Ireland Legal Quarterly Inc., 1971), ch. 11; Keeton, G.W., and L.A. Sheridan, The Law of Trusts, 10th ed. (London: Professional Books Limited, 1974), ch. 12; Keeton, G.W. and L.A. Sheridan, Digest of the English Law of Trusts (Milton: Professional Books Limited, 1979), pp. 249 ff; Maudsley, R.H., and E.H. Burn, Trusts and Trustees: Cases and Materials (London: Butterworths, 1972), ch. 10; McMullen, D.H., S.G. Maurice and D.B. Parker, Tudor on Charities, 6th ed. (London: Sweet and Maxwell, 1967) ch. 1,2; Lord Nathan, The Charities Act, 1960 (London: Butterworths, 1962); Parker D.B., and A.R. Mellow, The Modern Law of Trusts, 3rd ed. (London: Sweet and Maxwell, 1975), pp. 171 ff; Pettit, P.H., Equity and the Law of Trusts, 3rd ed. (London: Butterworths, 1974), ch. 6; Picarda, H., The Law and Practice Relating to Charities (London: Butterworths, 1974), ch. 1; Riddall, J.G., The Law of Trusts 2nd ed. (London: Butterworths, 1982); ch. 5;

Australia and New Zealand: Blacktop, B.J., Nevill's Concise Law of Trusts, Wills and Administration in New Zealand, 7th ed. (Wellington: Butterworths, 1980), ch. 3; Fricke, G., and O.K. Strauss, The Law of Trusts in Victoria (Sydney: Butterworths, 1964), ch. 10; Meagher, R.P., and W.M.C. Gummow, Jacobs' Law of Trusts in Australia, 4th ed. (Sydney: Butterworths, 1977), ch. 10.

United States: Bogert, G.G., and G.T. Bogert, The Law of Trusts and Trustees, rev. 2nd ed. (St. Paul, Minn.: West Publisher Co., 1977), ch. 19; Bogert, G.G., and G.T. Bogert, Handbook of the Law of Trusts, 5th ed. (St. Paul, Minn.: West Publishing Co., 1973), ch. 6; Scott, A.W., The Law of Trusts, 2nd ed. (Boston: Little, Brown and Company, 1956), vol. IV, ch. 11; Scott, A.W., Abridgment of the Law of Trusts (Boston: Little, Brown and Company, 1960), ch. 11.

69. (1968) A.C. 138.

70. Id., p. 154.

71. Id.

United States (cont'd)

72. Id., p. 146 per Lord Reid; p. 150 per Lord Upjohn; p. 155-56 per Lord Wilberforce.

73. See, for example, Waters supra note 16, and Chesterman supra note 68.

74. This issue is discussed in all the textbooks, but see in particular Atiyah, "Public Benefits in Charities," 21 Modern Tax Review 138 (1958).

75. See, most recently, Scottish Burial Reform and Cremation Society Ltd. v. Glasgow Corporation, (1968) A.C. 138.

76. A quote will illustrate this:

> It is a commonplace that that statute, as its title implied, was directed not so much to the definition of charity as to the correction of abuses which had grown up in the administration of certain trusts of a charitable nature. But from the beginning it was the practice of the court to refer to the preamble of the statute in order to determine whether or not a purpose was charitable. The objects there enumerated and all other objects which by analogy "are deemed within its spirit and intendment" and no other objects are in law charitable.

Gilmour v. Coats, (1949) A.C. 426, 442-3 (H.L.) per Lord Simonds.

77. But perhaps one should not be too quick to judge. In the United States, although the regulations to the Internal Revenue Code defining charity do not explicitly embrace "relief or redemption of Prisoners or Captives ...," which was mentioned in the preamble, they were construed to allow a deduction of gifts to ransom the Bay of Pigs prisoners. See Bittker and Rahdert, "The Exemption of Non-profit Organizations from Federal Income Taxation," 85 Yale Law Journal 299, 331, n. 81 (1976).

78. Of course once the courts adopted the preamble in defining the meaning of charities, the fact that the statute was repealed, legally, should be of little consequence.

79. As Lord Reid noted in Scottish Burial Reform and Cremation Society Ltd. v. Glasgow Corporation, supra note 75, p. 147;

> ... this gradual extension (by analogy to the preamble) has preceded so far that there are few modern reported cases where a bequest or donation was made or an institution was being carried on for a clearly specified object which was for the benefit of the public at large and not of individuals, and yet the object was held not to be within the spirit and intendment of the Statute of Elizabeth I.

> Counsel in the present case were invited to search for any case in which an object was held to be for the public benefit but yet not to be within that spirit and intendment. But no such case could be found.

80. Supra, note 75.

81. Supra, note 75, p. 156.

82. (1972) 1 Ch. 73 (C.A.).

83. Id., p. 94.

84. See "Appendix 8."

85. See generally, in particular, Chesterman, Supra 68, pp. 174-191.

86. Morrison, "Redefining 'Charities' in the Income Tax Act," (1982-83) The Philanthropist (Winter) 10. See generally Benthan, "Charity Law and Legislation: Recent Development," 15 Current Legal Problems, 159, 160 (1962) ("... a rigid adherence to prior precedents has in many cases led to a tangle of anomalies."); Fridman, "Charities and Public Benefit," 31 Canadian Bar Review 537, 550 (1953) ("... the criterion of distinction (between charitable and non-charitable purposes) is not easy to find. These cases may be hallowed, but they are anomalous and illogical" (footnote omitted)); Bentwich, "The Wilderness of Legal Charity," 49 Law Quarterly Review 520, 526 (1933) ("The clearest and simplest remedy for this evil of litigation about charity ... would be for Parliament to enact a modern definition or classification of charities on some broad lines. We cannot expect judicial interpretation to unravel the judicial knots ..."); and Brady, "The Law of Charity and Judicial Responsiveness to Changing Social Need," 27 Northern Ireland Legal Quarterly 198 (1976).

87. G.W. Keeton, The Modern Law of Charities (London: Sir Issac Pitman & Sons Ltd., 1962), VII. In the second edition of this work, which Keeton co-authorized with L.A. Sheridan, although this observation is not repeated in the preface, the authors note, "we are as far away as ever from any satisfactory definition of a charitable purpose." (Belfast: Northern Ireland Legal Quarterly Inc., 1971).

88. Incorporated Council of Law Reporting for England and Wales v. A.-G., (1971) 2 W.L.R. 550, 564 (Ch. D.). See also Re Tetley (1923) 1 Ch. 528, 266 (C.A.), per Lord Sterndale M.R. ("I, at any rate, am unable to find any principle which will guide us easily, and safely, through the tangle of cases as to what is and what is not a charitable gift. If it is

possible I hope sincerely that at some time or other a principle will be laid down. The whole subject is in an artificial atmosphere altogether."); Trustees of the Londonderry Presbyterian Church House v. Commissioners of Inland Revenue, (1946) N.I. 178, 187-88 (C.A.), per Andrews L.C.J. ("the authorities, whose number is legion, upon whether particular trusts fall within or without Lord Macnaughten's fourth category battle all efforts on my part to reconcile with one another ... Judicial minds have operated not always consistently on facts admittedly different; and the result can only be described as in a measure chaotic."); Re Howley's Estate, (1940) I.R. 109, 114, per Gavan Duffy J. ("Charity is in law an artifical conception, which during some 300 years, under the guidance of pedantic technicians, seems to have strayed rather far from the intelligent realm of plain common sense.").

89. G.W. Keeton and L.A. Sheridan, The Comparative Law of Trusts in the Commonwealth and the Irish Republic (London: Barry Rose, 1976), pp. 334-35 (footnote omitted).

90. Report of the Royal Commission on The Income Tax (Colwyn Commission) Cmd. 615 (London: HMSO, 1920). See generally on the work of the Commission, B.E.V. Sabine, A History of Income Tax (London: Allen and Unwin, 1966), ch. x.

91. "Memorandum by the Board of Inland Revenue on the Subject of the exemption from Income Tax Enjoyed by Charities," supra note 53, para. 12.

92. Id., para. 15.

93. (If the definition of charity is restricted demands) would no doubt be put forward in some cases for a state subvention or an increased state subvention; even so, relief from Income Tax is, apart from other considerations, not a scientific method of giving state support to any object and if in any of the cases affected the state should see fit to make a direct contribution in lieu of the present Income Tax exemption, it would be open to the state to make this contribution dependent on the proper administration of the institution concerned, and to take such steps as might be necessary to see:

(a) that the state's contribution is economically and effectively expended; and

(b) that the relief afforded is neither inadequate nor excessive.

Id., para 18.

94. Supra note 90, paras. 305-09.

95. Supra note 90, 307.

96. Supra note 90, 306.

97. Income Tax Codification Committee, Report: Volume I; Report and Appendices, Cmd. 5131 (London: HMSO, 1936).

98. Id., p. 5.

99. Id., p. 221.

100. Id., p. 222.

101. Report of the Committee on the Law and Practice Relating to Charitable Trusts (Nathan Committee) Cmd. 8710 (London: HMSO, 1952). See generally, Owen, supra note 53, ch. 21: Keeton, "The Nathan Report and Charities," in G.W. Keeton, Social Change in the Law of Trusts (London: Issac Pitman, 1958), p. 96.

102. W.H. Beveridge, Voluntary Action: A Report on Methods of Social Advance (London: Allen and Unwin, 1949).

103. See Brunyate, "The Legal Definition of Charity," 61 Law Quarterly Review 268 (1945) and Keeton "The Charity Muddle," 2 Current Legal Problems 86 (1949). Perhaps the most notorious case involved the estate of Caleb Diplock who had left his fortune "for such charitable or benevolent object or objects" as his trustees should select. The Court of Appeal held that "charitable" and "benevolent" were not synonymous, and that since "benevolent" was broader then "charitable" the trust was not exclusively for charitable purposes and therefore void for uncertainty Re Diplock (1941) Ch. 253 (C.A.).

104. Supra note 101, p. 1.

105. Supra note 101, ch. 3.

106. Supra note 101, para. 137.

107. Supra note 101, para. 127.

108. Supra note 101, para. 137.

109. The Report seems to suggest that after consideration the lay witnesses also agreed with this view. See Supra note 101, para. 132. Ten years later in a book on The Charities Act, 1960, which implemented many of the recommendations of the Nathan Committee, Lord Nathan expressed the Committee's conclusion in this way:

> Though certain cases decided in the years immediately preceding the setting up of the

Committee had given rise to some apprehension and uncertainties, the Committee considered that the courts had in fact succeeded in keeping the scope of charity in step with social change and that there was no case for an alteration in the content of the legal meaning of charity, nor for attempting a new definition of it by enumeration of valid objects, as, in their view, flexibility - the possibility of further growth - was to be preferred to certainty and clarity.

H.L. Nathan, The Charities Act, 1960, (London: Butterworths, 1962), p. 8. It is interesting to note that in the text of the Report the Committee had been equivocal about the need for a definition. For example, in para. 140, the Committee asserted "We consider a rewording of the 'definition' of charity is needed." This concern seems to have been forgotten in their recommendations.

110. Supra note 101, para. 132.

111. Supra note 101, para. 140.

112. Supra note 101, para. 139.

113. Supra note 101, para. 128 ("... we heard no suggestion that the content of the term 'charity,' as at present laid down in the large volume of case law on the Preamble, is either too wide or too narrow.").

114. Government Policy on Charitable Trust in England and Wales, Cmd. 9538 (London: HMSO, 1955).

115. Id., para. 3.

116. Royal Commission on the Taxation of Profits and Income: Final Report, Cmd. 9474 (London: HMSO, 1955), para. 165-175.

117. Id., p. 56, para. 168.

118. Id., p. 352, para. 5.

119. Id., p. 56, para. 170.

120. Id., p. 55, para. 167.

121. Id., p. 56, para. 169.

122. Id., p. 57, para. 173.

123. Id., p. 58, para. 175.

124. Id., p. 352, para. 2.

125. Id., p. 352, para. 4.

126. Id., p. 353, para. 6.

127. Id., p. 417, para. 211.

128. 8 and 9 Eliz. 1960, c. 58. See generally D. Owen, English Philanthropy 1660 - 1960 (Cambridge: Belknap Press, 1964), ch. 21; Marshall, "The Charities Act, 1960," 24 Modern Law Review 444 (1961); Lord Nathan, Nathan on the Charities Act, 1960 (London: Butterworths, 1962), and Maurice, "The Charities Act, 1960," 24 Conv. (N.S.) 390 (1960), reprinted in S.G. Maurice, The Charities Act, 1960 (London: Sweet & Maxwell, 1961).

129. See, in particular, the statement of the Home Secretary, Hansards (Commons), vol. 622, April 28, 1960, cols. 411-12.

130. See supra note 114.

131. When first passed there was some question as to the precise effect that a number of provisions in the Act might indirectly have on the definition of charities. See Marshall, supra note 128, p. 444 ff; and Maurice, supra note 128 p. 391 ff. However, it soon became clear that the common law definition was to continue unaltered.

132. He moved to insert as a new Clause 1:

> Definition of "charitable purpose"
>
> "For the purposes of this Act a charitable purpose is either -
>
> (i) one which exists for:
>
> (a) the advancement of religion; or
>
> (b) the advancement of education, learning, science or research; or
>
> (c) the relief of poverty; or
>
> (d) the promotion and advancement of social welfare, including public recreation and sport.
>
> (ii) one which otherwise than in paragraph (i) of this section benefits the public generally, whether with or without reference to or limitation within a locality, or within some group or section of the community.

> Provided that where the beneficiaries of a trust for any of the objects specified in paragraphs (i) and (ii) of this section are identified by the tie of blood relationship the trust will not be one for a charitable purpose; and where the beneficiaries of a trust for any of the objects specified in paragraphs (i) and (ii) of this section are identified by some contractural or similar bond of a continuing character, whether as members of an association or as employees of a limited company or other similar organization, the trust will be one for a charitable purpose; and provided further that the promotion of public recreation and sport shall not be for a charitable purpose unless it is for the benefit of persons who participate in it without financial remuneration."

Hansard (Lords), vol. 222, March 21, 1960, col. 5.

133. Hansard (Lords), vol. 222, March 21, 1960, col. 7. He gave a lengthy explanation of his bill. Id., cols. 7-9.

134. Id., cols. 9-14.

135 Id., col. 10.

136. Id., cols. 13-14.

137. Hansards (Commons), vol. 622, April 28, 1960, col. 418.

138. See, for example, Hansards (Commons), vol. 622, April 28, 1960, cols. 443, 482-83.

139. See, for example, Hansards (Lords), vol. 222, March 21, 1960, cols. 15-22.

140. Id., col. 22.

141. Id., col. 23.

142. See, for example, Maurice, supra note 128, p. 391 ("There was pressure on the government to include a definition in the Act but, wisely, it was resisted. When the Bill was in committee in the Lords, the Lord Chancellor pointed out it was impossible to devise a statutory definition of charity without altering the law, and the serious consequences which any alteration of the law in this respect would have." (footnotes omitted)).

143. (HMSO: 1975). See generally Sheridan, "Waiting for Goodman" 5 Anglo-American Law Review 153 (1976) ("As one would expect from a committee of politicians, the report is a mixture of naivete, suspicion, good intentions, silliness, sound common

sense, straight speaking, bad grammar, caution, and dogma."); Partington, "Review: 10th Report from the Expenditure Committee, 1974-75: Charity Commissioner and Their Accountability," 39 Modern Law Review 77 (1976).

144. The Expenditure Committee, Tenth Report: The Charity Commissioners and Their Accountability, 1974-75 (HMSO: 1975), para. 24.

145. This is a widely shared view, see Sheridan and Partington, supra note 143.

146. Supra note 144, para. 26.

147. Supra note 144, para. 32.

148. Supra note 144, para. 34. The recommendation goes on to provide that "in the case of those charities formerly admitted under one of the other heads, namely, the relief of poverty, the advancement of education and the advancement of religion, they should continue to qualify only if they also satisfy the main criterion. We do not believe such a change would affect the great majority of charities in any way; but we do believe it would act as a check to abuse at the fringe."

149. See Sheridan, supra note 143.

150. Supra note 144, para. 44. For a further discussion of this recommendation see chapter 2 of this paper.

151. Supra note 144, para. 50.

152. Supra note 144, paras. 53-62.

153. Partington, supra note 143, p. 83-84.

154. Charity Law and Voluntary Organizations (Goodman Report), prepared for the National Council of Social Services (London: Bedford Square Press, 1976).

155. For a brief description of the Council and its work see "Memorandum submitted by the National Council of Social Service," in Minutes of Evidence Taken before the Expenditure Committee, February 1975, p. 103-17.

156. Id., p. 104-05.

157. Id.

158. Charity Law and Voluntary Organizations (Goodman Report), prepared for the National Council of Social Services (London: Bedford Square Press, 1976).

159. Id., p.(i).

160. Id., p. 10.

161. Id., p. 11.

162. Id., p. 14-15, para. 31.

163. Id., p. 15, para. 32. The preamble is reproduced in Appendix 4 to this paper.

164. Id., p. 22, para. 50.

165. Id., p. 38, para. 93.

166. Id., p. 143, para. 3.

167. Id., p. 145, para. 6.

168. Editorial, "Charity Law Reform," 126 New Law Journal 1230, (1976).

169. P.H. Pettit, Equity and the Law of Trusts, 4th ed. (London: Butterworths, 1979), p. 172.

170. Cotterrell, "The Goodman Report and the Future of Charity Law," (1977) New Law Journal: Annual Charities Review (April 28) p. 3 at 8.

171. Id.

172. "Memorandum submitted by the Chief Chancery Master," Minutes of Evidence Taken before the Expenditure Committee, March 10, 1975, p. 173, 174-5.

173. Incorporated Council of Law Reporting for England and Wales v. A.-G., (1971) 3 W.L.R. 853, 868.

174. Charity Commissioners, Annual Report 1973, p. 5, para. 2.

175. Id., see also "Memorandum by the Charity Commissioners," in Expenditure Committee, Charity Commission and Their Accountability, Minutes of Evidence and Appendices, 1975 (London: HMSO, 1975), vol. 2, para. 40, where the Commissioner stated that a statutory definition is "in any case, unecessary (and) .. (a) modern list would look as antiquated as the list in the preamble to the Statute of Elizabeth."

176. Keeton, "Some Problems in the Reform of the Law of Charities," 13 Current Legal Problems 22, 23 (1960). See also Keeton, "The Charity Muddle," 2 Current Legal Problems 86, (1949) ("I do not think there is any comfort to be gained from definitions in this branch of the law.") More recently, Professor Keeton, although still not convinced that a statutory definition would improve decision-making in this area, has despaired at the courts ability to rationalize the law.

Thus he has recommended that a special administrative tribunal be established to determine the question of what is a charity. Although he is even unsure of this solution, see infra note 177.

177. See G.W. Keeton, Modern Law of Charities, (London: Issac Pitman & Sons Ltd., 1962) 44. See also Brunyate, "The Legal Definition of Charity," 61 Law Quarterly Review 268, 284-85 (1945) ("To re-define charity by statute on the lines of existing law would not be easy and might well confuse rather than clarify the law, for the essential difficulties connected with benefit to the public require more explanation and analysis than is convenient in an Act of Parliament."); Bentham, "Charity Law and Legislation: Recent Developments," 15 Current Legal Problems 159, 162 (1962) ("... little comfort is to be gained from definitions in this branch of the law.").

178. Bittker and Rahdert, "The Exemption of Non-profit Organizations from Federal Income Taxation," 85 Yale Law Journal 299, 331-32 (1976).

179. A.W. Scott, The Law of Trusts, 3d ed. (Boston: Little, Brown & Company, 1967), vol. 4, para. 368, p. 2855-56. The following comments by American Commentators are also typical:

> To attempt to codify this concept (charity) would require us to consider all of the pertinent court decisions and perhaps would answer no special purpose not now served by reference books which explain the principles of law in relation to charitable uses ... (to) try to provide a substitute definition probably would be even less useful ... its immediate result would be more confusing than enlightening.
>
> Reiling, "Federal Taxation: What is a Charitable Organization?" 44 American Bar Association Journal 525, 526 (1958).
>
> ... it would be generally impracticable to delineate the statutory criteria any more precisely than is now done in section 501(c)(3), although statutory solutions to specific problems may be appropriate from time to time.
>
> A comprehensive definition has never been formulated ... and the authorities now agree that to do this would be impossible. Charity is an evolving concept which must be allowed to change and expand in response to the needs of society.
>
> Persons, Osborn and Feldman, "Criteria for Exemption Under Section 501(c)(3)," in Research Papers, sponsoreed by The Commission on

Private Philanthropy and Public Needs (Washington: Department of the Treasury, 1977), vol. IV, p. 1909.

It is impractical to attempt to frame a definition which includes a description of all the types of activity which the courts regard as an advantage to the community (footnote omitted).

G.G. Bogert and G.T. Bogert, The Law of Trusts and Trustees, 2nd ed. (St. Paul, Minn.: West Publishing Co., 1965), para. 369, p. 62.

180. (Ottawa: Queen's Printer, 1966), vol. 4, p. 132.

181. Inland Revenue Commissioner v. McMullen, (1981) A.C. 1, 15 (H.L.).

182. (1949) A.C. 426 (H.L.); (1949) 1 All E.R. 848.

183. Id., A.C. at 443; All E.R. at 853.

184. Waters, supra note 16, p. 461.

185. Expenditure Committee, The Charity Commissioners and Their Accountability, Tenth Report, 1974-75 (London: HMSO, 1975) p. vi.

186. (1968) New Law Journal Annual Charities Review 42, 46.

187. Keeton, "The Charity Muddle," 2 Current Legal Problems 86, 91 (1949).

188. R.H. Maudsley and J.E. Martin, Hanbury and Maudsley: Modern Equity, 11th ed. (London: Stevens and Sons, 1981), p.447.

189. Hackney, "The Politics of the Chancery," 34 Current Legal Problems 113 (1981).

190. (1972) Ch. 73.

191. Id., p. 88.

192. (1968) A.C. 138, 156.

193. See Appendix 8.

194. Id.

195. House Committee on Ways and Means, 92nd Congress, 2d Session, Legislative Activity by Certain Types of Exempt Organizations 5 (Committee Print 1972); quoted in Persons, Osburn and Feldman, supra note 179, p. 936, footnote 227. Testifying before Congress in 1970, during hearings involving public-interest

law firms, Commissioner of Internal Revenue Randolph W. Thrower stated:

> The Internal Revenue Service in its decisions has followed the established law. But a special problem of the Service is that the recognized needs of society and the programs designed to meet those needs have been quite varied, often experimental, and more recently have moved much faster than the development of the decisional law. This is not intended in any sense to say that any given movement is not highly beneficial but only that it involves new areas raising new questions and that there rests somewhere the responsibility of determining to what extent these efforts meet the test of being charitable ...
>
> By reason of the peculiar interplay between our tax laws and the development of new charitable programs, particularly where major foundation funding is essential to the program, the Internal Revenue Service frequently finds itself at the leading edge of the movement of charity into new and unexplored fields. And, as I have said, because our decisions are often accepted as conclusive, the responsibility is a heavy one.

Senate Hearings on Tax Exemption for Charitable Organizations - Examination of IRD Decision to Deny Exempt Status. (Testimony of Commissioner Thrower before Senate Subcommittee on Employment, Manpower and Poverty) November 16, 1970, quoted in Persons, Osborn and Feldman, supra note 179, footnote 226.

196. In stating that the advantage of the common law approach over a statutory definition is that it preserves flexibility, the Chief Charity Commissioners put their position this way:

> There was a very extensive discussion in both Houses of Parliament, at the time when the Charities Bill was going through, on the question of whether it was desirable to have a statutory definition. Everyone agreed that it was extremely difficult to produce a workable definition and, at the same time, to preserve the flexibility which is inherent in the present arrangement of looking back to the case law. Under the present arrangements it has proved possible over the years for the courts gradually to extend the boundaries of charity so that as new deserving causes have come along they have been able to find that they can be regarded as being charitable. This is the sort of flexibility which we find very

> valuable today and which the courts, I think, still find very valuable. The difficulty, we think, of having a statutory definition, is that this would ossify the position so that although you might get a definition which would cover everything at the present time, perhaps in another five or 10 years you would find that your hands were tied too much and that it was not possible to extend the boundaries of charity as we can now."

Expenditure Committee, 1974-75, Charity Commissioners and Their Accountability, Minutes of Evidence and Appendices (HMSO, London, 1975) pp. 24-25.

197. Supra note 37, p. 35.

198. See generally, D.W.M. Waters, Law of Trusts in Canada (Toronto: Carswell, 1974), ch. 14; A.H. Oosterhoff, Cases and Materials on the Law of Trust (Toronto: Carswell, 1980), ch. 6.

199. See "Appendix 8".

200. Charities Act 1960, 8 & 9 Eliz. II, c. 58.

201. British North America Act, 1867, 30 & 31 Vic., c. 3.

202. See generally Waters, supra note 198, pp. 535 ff.

203. R.S.O. 1980, c. 65.

204. Mortmain and Charitable Uses Act, R.S.O. 1980, c. 97; Charitable Gifts Acts, R.S.O. 1980, c. 63; Charitable Institutions Act, R.S.O., 1980, c. 64. See a brief discussion of the Ontario Acts see Waters, supra note 198, 537ff; 4 CED (Ontario) 3 ed. (Toronto: Carswell Co. Ltd. 1974), title 24.

205. Co-op College of Canada v. Sask. Human Rights Commission, (1976) 2 W.W.R. 84 D.L.R. (3d) 531 (Sask. C.A.).

206. See generally, Waters, supra note 198, pp. 445ff.

207. See summary of recent cases in Appendix 8.

208. See Persons, Osborn and Feldman, supra note 179, p. 1935-36.

209. See Cross, "Some Recent Developments in the Law of Charity," 72 Law Quarterly Review 187, 204 (1956);

> (it is) unfortunate that the recognition of any trust as a valid charitable trust should automatically attract fiscal privileges, for the question whether a trust to further some purpose is so little likely to benefit the

public that it ought to be declared invalid and the question whether it is likely to confer such great benefits on the public that it should enjoy fiscal immunity are really two quite different questions.

See also Nightengale, Charities (London: Allen Lane, 1973) p. 65-66.

210. Which way the question of whether a trust is charitable is answered may even depend to some extent on whether it comes before the court in a "Chancery" case, in which the claims of charity are opposed by the next-of-kin, or in a "Revenue" case, in which they are opposed by the Commissioners of Inland Revenue. The claims of the next-of-kin can hardly fail to appear somewhat unmeritorious, are often not very seriously pressed and are seldom taken to appeal. The reports of Chancery cases at first instance are, therefore, full of "borderline" decisions in favor of charity. The arguments of the Revenue authorities, on the other hand, tend to be listened to with more sympathy, and in any cases to appeal. It is noteworthy that most of the recent decisions in the higher courts limiting the scope of charity have been in "Revenue" cases.

Id., pp. 204-5.

See also, Gravells, "Public Purpose Trusts," 40 Modern Law Review 397 (1977); Chesterman, supra note 49, p. 397ff.

211. Dingle v. Turner, (1972) A.C. 601, 624-25.

212. For example, see Brady, "The Law of Charity and Judicial Responsiveness to Changing Social Need," 27 Northern Ireland Law Quarterly 198, 213 (1976) ("it is unarguable that the fiscal consequences of finding a trust charitables have been a factor ... which has exercised judicial minds in the past.").

213. Viscount Dilhorne, Lord MacDermott and Lord Hodson, supra note 211, p. 614.

214. Id.

215. See G.W. Keeton, (London: Issac Pitman & Sons Ltd., 1972) p. 44. But see also G.W. Keeton and L.A. Sheridan, The Modern Law of Charities, 2nd ed. (Belfast: Northern Ireland Legal Quarterly Inc., 1971), p. 51 ("It is desirable, if not essential, to preserve a single definition of charity, whether for the purposes of validity, rating or taxation; but that does not mean that all charities should necessarily be treated equally for purposes of exemption of relief from rates, income tax, selective employment tax, etc.; nor that

all charities should in any respect necessarily be treated differently from all non-charities.").

216. In Australia, the scope of the meaning given to the concept of charity depends upon the particular Act under consideration. Taxation Review Committee Report (Asprey Comm.) (Canberra: Australian Government Publishing Service, 1975), p. 495, para. 25.38-25.39.

The Scottish definition of a charitable trust is broader than that adopted in England, however, for tax and rating purposes the English definition is used. See G.W. Keeton and L.A. Sheridan, The Comparative Law of Trust in the Commonwealth and Irish Republic, (London: Barry Rose (Publishers) Ltd., 1976), pp. 87-88, 96-98.

217. R.S.C. 1970, c. C-32, s. 154.

> The Minister may by letters patent under his seal of office grant a charter to any number of persons, not being fewer than three, who apply therefore, constituting the applicants and any other persons who thereafter become members of the corporation thereby created, or body corporate and politic, without share capital, for the purpose of carrying on, without pecuniary gain to its members, objects, to which the legislative authority of the Parliament of Canada extends, of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or the like objects.

Although the Canada Business Corporations Act was enacted S.C. 1974-75-76, c. 33, it is not applicable to corporations incorporated under Part II of the Canada Corporations Act, RSC 1970, c. C-32. These corporations without share capital cannot be continued under the CBCA (CBCA s. 261(10)). The CBCA has no non-share capital corporations provisions and is directed primarily at "corporations incorporated to carry on business throughout Canada..." (CBCA s. 4).

218. Bill S-3, third reading Senate, Debates, March 22, 1978, p. 511, first reading H. of C., Debates April 3, 1978, p. 4065; Bill S-4 third reading Senate, Debates, November 23, 1978, p. 259 second reading H. of C., Debates, December 12, 1979, p. 551, first reading H. of C., Debates, December 13, 1979, p. 2325.

219. Second reading, H. of C., Debates, December 17, 1981, p. 14193.

220. Id., section 2.

221. See Cumming, Proposals for a New Not-For-Profit Corporations Law for Canada (Ottawa: Information Canada, 1974), vol. 1, p. 6, para. 26.

222. For example, under Bill C-10, supra note 219, any member of the public by paying a reasonable fee could obtain access to various corporate records of a charitable corporation (clause 20), the scope of charitable corporations permissible investments is more limited than those of membership corporations (clause 27), charitable corporations must have an auditor's committee (clause 153), and charitable corporations that solicit from the public must get judicial approval before amending articles restricting their activities.

223. It is unclear whether the drafters intended it to be broader. In the commentary to the initial proposed legislation, prepared by Peter A. Cumming a professor of law at Osgoode Hall Law School, in explaining the need for a distinction between charitable and membership corporations in corporate law, it is stated "This is not to suggest that the corporation law adopt the criteria which may be employed in tax legislation in determining exempt or deductive status. Questions of tax policy are properly, of course, appropriate concerns only of taxation legislation and should not be dealt with as part of the statute enabling incorporation." Supra note 221, p. 7, para. 31. However, in other places the commentary appears to suggest that the concept of charity as used in the corporate legislation would have the same meaning it has in tax legislation. Id., pp. 5-6, para. 25. Reprinted in Cumming, "Corporate Law Reform an Canadian Not-for-Profit Corporations," 1 Philanthropist 10, 17-18 (1974).

224. In the New York State legislation, from which the Canadian legislation was derived, see supra note 219, non-profit corporations are divided into four categories. One of these categories is intended to encompass substantially the same class of organizations that qualify under section 501 (c) (3) of the Internal Revenue Code. Section 201 of the New York Not-For-Profit Corporation Law, Laws 1969, chap. 1066 (being chap. 35 of the Consolidated Laws). See generally, Comment, "New York's Not-For-Profit Corporation Law," 47 New York University Law Review 761 (1972) 210, para. 110(1)(a).

225. Para. 110(1)(a).

226. See Johnson, "The Determinants of Charitable Giving with Special Emphasis on the Income Deduction under the Income Tax - A Survey of the Empirical Literature," 3 Canada Taxation 258 (1981).

227. See generally on the issue of drafting in detail or in general terms, Brooks, "The Common Law and the Evidence Code: Are They Compatible, 27 University of New Brunswick Law Journal 27 (1978).

228. See generally M. Chesterman, Charities, Trusts and Social Welfare (London: Weidenfeld and Nicolson, 1979), pp. 400-03.

229. Nightengale, supra note 209, p. 65.

230. G.W. Keeton, The Modern Law of Charities (London: Issac Pitman, 1962), p. 44.

231. G.W. Keeton and L.A. Sheridan, The Modern Law of Charities, 2nd ed. (Belfast, Northern Ireland Legal Quarterly, 1971), p. 51. In an article in 1949 Keeton had suggested that perhaps a preferable position would be for the House of Lords to issue a periodic statement of the broad principles upon which charity cases would in the future be decided. See Keeton, "The Charity Muddle," 2 Current Legal Problems 86, 102 (1949). For a critique of this suggestion since such statements are likely to assume the force of statute and are not likely to be periodically revised see Bentham, "Charity Law and Legislation: Recent Development," 15 Current Legal Problems 159, 162 (1962). Such a suggestion is, of course, open to a much more fundamental criticism based on appropriate role of the courts.

232. Waters, "Comment: What is Charity? Recreational Community Centres," 54 Canadian Bar Review 784, 794 (1976).

233. As a matter of interest, one reason there has been pressure for over 100 years to take the application of the cy-près doctrine from the courts is that the courts are unsuited for the kind of fact finding the application of the doctrine requires. For example, over 100 years ago the Report of the Schools Inquiry Commission of 1867-68 concluded:

> A court of law is in many respects not the best tribunal for deciding questions of this kind, which are much more often administrative than judicial, rather matters of policy and commonsense than the law. To decide such questions it is absolutely necessary to have large discretionary powers, and, as Lord Westbury remarks, 'the habits of a court of justice unfit them for the large views which should regulate the exercise of such powers.' And, if this is the case in dealing with schemes as they have been hitherto dealt with, a fortiori it applies to any reorganization of trusts over a whole district, which is to treat them in their mutual relations, instead of dealing with them one by one. It would be quite out of the usual course of a court of equity and a matter for which its machinery is unfitted, to consider not only the trust before it, but its relation to all the other trusts over a considerable district. Both the

> reason of the thing and the weight of evidence applied to concur in pointing to the expediency of removing these questions from the Court of Chancery, and this opinion is confirmed by the adhesion of several of the highest legal authorities.

Quoted in G.W. Keeton, English Law: The Judicial Contribution (Newton, Eng.: 1974), ch. 8 "Judicial Failure in the Law of Charities," p. 150.

234. Because both analogical reasoning and an investigation of issues of social policy might realistically be involved in the delineation of whether a purpose is charitable a commentator has suggested that perhaps some kind of mixed tribunal should determine the question. Cotterall, "A Legal Re-Definition of Charity," 126 New Law Journal Annual Charities Review 30, 40 (May 6, 1976). ("Perhaps the parallel requirements of consistency and social utility will dictate some combination of techniques blending the expertise of the lawyer and that of the specialist in various aspects of social welfare.")

235. This of course is a crude generalization. Administrative tribunals that are completely insulated from the government can be established, and courts might well be susceptible to political pressures.

236. Hackney, "The Politics of the Chancery," 34 Current Legal Problems 113, 127 (1981).

237. On the justification for tax subsidization of the voluntary sector see generally Stone, "Federal Tax Support of Charities and Other Exempt Organizations: The Need for a National Policy," (1968) U.S. Cal. Tax Inst. 27, 39-41; Commission on Private Philanthropy and Public Needs: Giving in America - Toward a Stronger Voluntary Sector (1975) p. 9-10; Smith, "Values, Voluntary Action, and Philanthropy: The Appropriate Relationship of Private Philanthropy to Public Needs," in Commission on Private Philanthropy and Public Needs, Research Papers (Washington: Dept. of the Treasury, 1977), vol II(a), p. 1093. (The author argues that a thorough examination of private philanthropy would involve an examination of:
    values and needs, public and private;
    institutional need, satisfaction mechanisms, including philanthropy;
    evaluation of the relationship between needs and institutional need satisfaction mechanism.) Sacks "The Role of Philanthropy: An Institutional View," 46 Virginia Law Review 516 (1960); National Advisory Council on Voluntary Action to the Government of Canada, People in Action (Ottawa: Minister of Supply and Services, 1980), ch. 2.

238. (R.S.O. 1980, 6.97, s. 1 (21))?

APPENDIX 1

NATIONAL VOLUNTARY ORGANIZATIONS

In late 1981 the National Voluntary Organizations submitted a proposed definition of "charitable objects" to the Minister of Finance, the Hon. A.J. MacEachen. The purpose of the definition is explained in Morrison, "Redefining 'Charities' in the Income Tax Act," (1982-83) The Philanthropist (Winter) 10. Its purposes include: updating the common law definition; elaborating on the fourth category in Pemsel's case, "other purposes beneficial to the community" in order to render its meaning less vague; removing any uncertainty that might exist about the charitable status of organizations in the fields of health, conservation of nature, and assistance for the disabled; allowing charities to engage in political activities; and allowing the definition to evolve over time in the light of social change.

Enactment

1 (a) For the purposes of this Act charitable objects include:

assistance to a disadvantaged person or group of person;
advancement of religion;
advancement of education;
advancement of health;
conservation of natural environment; and
other purposes beneficial to the community including cultural or social development or improvement of the physical or mental well-being of the community.

(b) In this section: the meaning of "disadvantaged" includes, but is not limited to, a lack of opportunity to participate fully in the life of the community due to geographical, environmental, economical, racial, health, sex, age or disability factors.

2 Charitable activities mean all activities carried on in Canada or the international community by a charitable organization in furtherance of its charitable objects except those activities set out in Section 3.

3 The following activities shall not be considered charitable:

(a) incitement to sedition or violence;
(b) the support or opposition, financial or otherwise, of a political party or candidate at any level of government; or
(c) the acquisition or expenditure of money or anything of value for the benefit of any member of the charity.

APPENDIX 2

BRUNYATE

In 1945, John Brunyate, an English legal scholar, proposed a definition of charity in an article entitled, "The Legal Definition of Charity," 61 Law Quarterly Review 268, 283-84 (1945). His main concern was to attempt to provide more precision to the concept "other purposes beneficial to the community." The definition is included here as an illustration of the difficulty of such a task. The definition is frequently referred to by commentators and was criticized in Keeton, "The Charity Muddle," (1949) Current Legal Problems 86, 101-02.

Enactment

1 The relief of poverty or other distress.

2 The advancement of education, learning, science and research.

3 The public advancement of religion.

4 Purposes beneficial to the community not falling within the preceding heads, which satisfy the following rules:

(a) A purpose is not charitable unless the benefit thereby conferred to the community is substantial having regard to the nature of what is given.

(b) A purpose which is for the direct benefit of a particular class of persons (other than a state institution) is not charitable, although it results in an indirect benefit to the community.

(c) Subject as aforesaid a purpose is charitable if either:

it confers a direct and tangible benefit on all members of the community; or
it confers a direct and tangible benefit on a particular institution of the state tending to increase the efficiency of its communal activity; or
not being for the direct benefit of a particular class of persons it is in the general enlightened opinion of the time wholly for the benefit of the community although such benefit be intangible.

(d) In this context the community means either the international community, the national community, or a local community (that is to say, a substantial geographical section of the national community) or a section of a community determined by sex or age. Any other section of the community is to be regarded as a particular class of persons.

APPENDIX 3

AMERICAN LAW INSTITUTE'S RESTATEMENT OF THE LAW OF TRUSTS

The American Law Institute in its Restatement of the Law of Trusts attempted to restate the United States common law definition of charity. Although restated for purposes of the law of trust, in broad outline it is the same as a restatement for tax purposes would be. Also, the American common law rules of charity are virtually identical to the Canadian and English.

A drafting technique commonly used by the Institute is to attempt to make the reason for or consequence of a rule apparent on its face. Thus, for example, purposes beneficial to the community are described in the definition of charity as purposes sufficiently beneficial "to justify permitting property to be devoted forever to their accomplishment." This is a reference to the consequence that if a trust is held to be charitable it can have an unlimited life. Obviously, if such a technique were to be used for tax purposes a different wording would be required.

Of all the attempted codifications of the common law, the Institute's Restatement is the most general. In their comments to the restatement, the institute elaborates in some detail on the scope of these general provisions.

Enactment

1 Charitable purposes include:

the relief of poverty;
the advancement of education;
the advancement of religion;
the promotion of health;
the promotion of purposes which are of a character sufficiently beneficial to the community to justify permitting property to be devoted forever to their accomplishment.

2 An organization is not charitable if the persons who are to benefit are not a sufficiently large or indefinite class so that the community is interested in the enforcement of its purposes.

3 An organization is not charitable if the property or the income therefrom is to be devoted to a private use.

4 A purpose the accomplishment of which is illegal or contrary to public policy is not charitable.

APPENDIX 4

REPORT ON CHARITY LAW AND VOLUNTARY ORGANIZATIONS (GOODMAN REPORT)

In 1974, the English National Council of Social Services appointed a committee under the chairmanship of Lord Goodman to examine the role of voluntary organizations. One of the principal issues the committee addressed was the definition of charity. Indeed, the committee was predisposed to recommend a new definition of charity (p.(i)). However, in their report they recommended against a new definition. Instead their recommendation was that:

> While we cannot devise a neat encapsulated definition of charity, we recommend that the categories of charities should be restated in simple and modern language replacing that of the Act of 1601 and extending these to include objects now considered to be within the scope of charity. This would not make existing case law irrelevant but the courts would have more freedom to reconsider it in the context of the new categorization (p. 16).

An introductory note and the restatement of the categories of charities as drafted by the committee are reprinted below.

Enactment

Guidelines in Relation to the Meaning of Charitable Purposes

The following guidelines are intended to be in substitution for the guidelines contained in the preamble to the Statute of Uses 1601 and the classification of charities contained in the speech of Lord Macnaughten in Pemsel's case. They do not obviate the need for compliance with other criteria of charity such as benefit to a sufficient section of the community and exclusion generally of private profit. The categories of charity contained in the guidelines are not intended to be either exhaustive or immutable but only to be a statement of the types of activity which at the present time should come properly and eminently within the scope of charitable purposes. Any of the said purposes shall be in principle charitable if carried out by UK charities operating abroad.

The expression 'charitable purposes' shall include and shall be deemed always to have included the following purposes, that is to say:

(a) The relief of poverty howsoever caused and its prevention in suitable cases.

(b) The relief and prevention of sickness and disability, both physical and mental, including:

the provision and staffing of hospitals, nursing and convalescent homes and clinics;
the promotion of medical research;
the provision of advice, treatment or comfort;
the establishment of homes, workshops or other centres for the disabled or the mentally or physically handicapped or any other disadvantaged or needy persons.

(c) The relief of the suffering and distress or disability caused by old age, including the provision of homes for the care and maintenance of the old and of housing for old people adapted to their special needs.

(d) The relief of distress caused by natural disasters or sudden catastrophes.

(e) The advancement of education including:

the provision of schools, colleges, universities, and other like institutions;
the establishment of professorships, fellowships, and lectureships;
the provision of scholarships, bursaries and prizes;
the provision of physical training and sports for young persons both within and without such institutions;
the education of the public generally including those not engaged in full-time study at school, colleges, universities, and other like institutions.

Provided that no attempt is made to influence the public by propaganda.

(f) The promotion of research in any field of knowledge seriously deserving to be researched into, whereby the common stock of knowledge can be increased provided that the fruits of such research are intended to be (and are) made available to the public.

(g) The advancement of science (here meaning all recognized branches of learning, and not merely the natural sciences), and the maintenance of institutions therefore, including the support and maintenance of learned societies.

(h) The nurturing of public taste in aesthetic matters, including art, music, literature and fine craftsmanship including facilities for their practice.

(i) The provision and maintenance of museums and art galleries.

(j) The advancement of religion (there meaning belief in and reverence for a divine power) and the practice of the worship of that divinity, including:

the organization and carrying out of religious instruction, pastoral and missionary work at home and overseas;
the provision and maintenance of buildings for such worship or any other religious use;
the payment of stipends to and the provision of houses for ministers of religion, their widows and dependent children; and
other purposes tending to promote the moral or spiritual welfare of the community.

(k) The advancement of ethical and moral teachings and studies.

(l) The provision of social welfare services for those in need of them.

(m) The provision of housing for those in special need.

(n) The protection (including preservation and improvement of the national heritage whether physical, environmental, artistic, cultural, or otherwise.

(o) The promotion of sport and recreation, including the provision of facilities for recreation within the meaning of the Recreational Charities Act 1958.

(p) The welfare of children including prevention of cruelty to them.

(q) The promotion of the social welfare of the family.

(r) The welfare of animals including prevention of cruetly to them.

(s) Rehabilitation and resettlement.

(t) The establishment in life of young people.

(u) The establishment of organizations to assist sections of the community with special needs, for example, one-parent families, single persons with dependants, battered spouses, specially gifted children and immigrants.

(v) Advice giving in suitable circumstances.

(w) The provision of public works for the benefit of the community and the protection of the lives and property of the community (to the extent that these services are inadequately provided for by the State).

(x) The advancement and improvement of the standards of efficiency of industry, commerce and agriculture.

(y) The maintenance and improvement of the efficiency of the fighting forces and the police force and their welfare.

(z) Gifts for the benefit of the inhabitants of a particular place or for the benefit of a particular section of the community.

APPENDIX 5

DIGEST OF THE ENGLISH LAW OF TRUSTS

One of the most ambitious attempts to restate in detail the common law definition of charity in legislative form was undertaken by the two leading English scholars in the field, G.W. Keeton and L.A. Sheridan, in their book Digest of the English Law of Trusts (Milton: Professional Books, 1979), p. 249-253. In their treatise there is an extensive commentary, with reference to the common law cases, following their restatement.

Enactment

Section 150 - General Nature of Charitable Trusts

A trust is charitable if:

(a) no person is entitled to benefit under it; and
(b) all its purposes fall excusively within section 151; and
(c) its terms do not permit any of its purposes to be carried out by promoting or opposing legislation or by any other form of political activity, except to the extent that the political activity, not being a main object of the trust, is ancillary or incidental to the carrying out of the purposes by means which are not political.

Note on Section 150

Section 151, post, sets out what purposes are charitable. As to paragraph (c), see Charities, pp. 36-37. See also section 191(8), (9), post; Illustration 31 of section 151, post.

Section 151 - Charitable Purposes

1 The relief of poverty is charitable.

2 The advancement of any religion not subversive of the state or morals is charitable, provided the advancement is to be carried out among the public or a section of the community; and, without prejudice to the generality of the foregoing, the advancement of religion includes:

(a) the provision, maintenance and improvement of places of public worship;
(b) the provision of facilities in places of public worship;
(d) the provision of stipends or expenses of their religious work for clergymen;
(d) provision for the general benefit of an ecclesiastical parish or diocese;
(e) the provision, improvement or maintenance for the public benefit or for the benefit of a section of the community of facilities for burial or cremation;

(f) the support of missions or missionaries;
(g) the publication of religious works;
(h) religious instruction and the training of clergymen.

3 The following are charitable when carried out for the public benefit or for the benefit of a section of the community:

(a) the advancement of education, whether or not at a school, university or other organized institution of learning, including both the spread and increase of the stock of knowledge, but not including the promotion of a particular point of view unconnected with the advancement of religion; and, without prejudice to the generality of the foregoing, the advancement of education includes:

the advancement of vocational, professional, scientific, technical and commercial training;
the provision of prizes, scholarships and fellowships;
the provision, improvement or maintenance of museums and of facilities for enjoying the fine arts;
the provision of zoological gardens and other facilities for scientific study;

(b) provision for the welfare of animals, including the preservation of wildlife, the relief of animals in distress and the prevention of cruelty to animals, but not the suppression or reduction of vivisection;

(c) the provision, improvement or maintenance of facilities for outdoor recreation, or, if the facilities are provided in the interests of social welfare, for any recreation or other leisuretime occupation, including facilities at village halls, community centres and women's institutes;

(d) the relief of people who, by reason of old age, extreme youth, physical or mental disability or otherwise, are unable to fend for themselves, including, without prejudice to the generality of the foregoing:

the provision, improvement or maintenance of residential accommodation for old people or of homes of rest for people requiring rest;
the education, preferment or housing of orphans or of other young persons in need of care;
the relief of suffering resulting from natural or man-made disasters such as floods, earthquakes, mines accidents and war;
the protection of persons in the enjoyment of their civil rights;

(e) the promotion of health, including, without prejudice to the generality of the foregoing:

the improvement or maintenance of hospitals;
the advancement of knowledge and training in medicine, surgery, nursing and midwifery;
the reduction of drunkenness, alcoholism and the taking, otherwise than for therapeutic purposes, of potentially harmful drugs;

(f) provision for the benefit generally of the people of a country, or of a village, parish, community, town, district or county;

(g) the provision, improvement or maintenance of public works and amenities, including, without prejudice to the generality of the foregoing:

any facilities charged on the rates;
police, fire brigades, lifeboat services and similar public services;
places of historic interest or natural beauty;
memorials to events or public figures;
the administration of justice;

(h) the support of the armed forces of the Crown; and provision for the benefit of former members of the armed forces of any country;

(i) the promotion of international peace;

(j) the promotion of agriculture, industry or commerce, but not of the interests of any particular person or group of persons engaged in one or more of them;

(k) the support of penal institutions;

(l) the promotion of any other purpose which is analogous to a purpose mentioned in this section as being charitable or which comes within the spirit of this section as a whole as to what is charitable.

4 For the purposes of subsections (2) and (3), whether there is a benefit to the public or to a section of the community is a question of fact to be determined on the evidence, not by reference to the opinion of the settlor.

5 For the purposes of subsections (2) and (3), a section of the community means some members of the public described by reference to the area in which they live or in some other way, but does not include a group of people related by blood or contract such as:

(a) relations of the settlor or of any other person or persons;
(b) members of a friendly society, trade union, organization for the benefit of members engaged in a profession, other mutual benefit society or a club of any kind

except, for the purpose of the advancement of religion, a church or sect;

(c) subject to subsection (6), persons related to each other or to any other person or persons by contract in any way.

6 Persons employed by a common employer are not a section of the community for the purposes of subsections (2) and (3) except:

(a) where all the inhabitants of a country or other locality designated by the terms of the trust engaged in a calling there designated are employed by a common employer; or

(b) where the employees of an employer are sufficiently numerous to constitute, in the opinion of the court, a section of the community.

7 A trust for the advancement of education, if otherwise for the benefit of the public or a section of the community, is charitable notwithstanding that the terms of the trust allow or require a preference or advantage of some kind to be given to the members of any such group of persons as is mentioned in subsection (5) as not constituting a section of the community; but is not charitable if any part of the trust property must be applied exclusively for the benefit of a member or members of such a group.

APPENDIX 6

UNITED STATES INTERNAL REVENUE CODE, REGULATIONS

In discussions of codification, reference is frequently made to the United States' Internal Revenue Code's definition of charity. In fact, the Code does not define charity. Instead section 501(c)(3) simply lists eight exempt purposes for which tax-exempt organizations can be organized and operated, viz., (1) charitable, (2) religious, (3) education, (4) scientific, (5) testing for public safety, (6) literary, (7) national and international amateur sports competition, and (8) prevention of cruelty to children or animals. It is clear that this list does not constitute a definition of charity. Indeed, it has been suggested that the list does not extend beyond the common law definition of charity, see B.I. Bittker, Federal Taxation of Income, Estates and Gifts (Boston: Warren, Gorham & Farront, 1981) vol. 4, ch. 100, pp. 17-18. However, the IRC regulations elaborate considerably on these statutory purposes. In the regulations, the Treasury has attempted to state the definition's generally accepted legal sense as developed by judicial decisions. The relevant regulation, regulation 1.501(c)(3)-1, deals with a number of aspects of the organization and operations that relate directly to the definition of "charitable" are reproduced here. However, even the regulations do not constitute a complete definition of charity. The Internal Revenue Service's published revenue rulings and the Exempt Organization Handbook provide further guidance on the various kinds of activities that have been held charitable for purposes of section 501(c)(3). For a general discussion of the regulations and related rulings see Persons, Osborn and Feldman, "Criteria for Exemption under Section 501(c)(3)," in Commission on Private Philanthropy and Public Needs, Research Papers (Washington: Department of the Treasury, 1977), vol. IV, p. 1909.

Enactment

(d) Exempt purposes - In general.

(i) An organization may be exempt as an organization described in section 501(c)(3) if it is organized and operated exclusively for one or more of the following purposes:
religious;
charitable;
scientific;
testing for public safety;
literary;
educational; or
prevention of cruelty to children or animals.

(ii) An organization is not organized or operated exclusively for one or more of the purposes specified in subdivision (i) of this subparagraph unless it

serves a public rather than a private interest. Thus, to meet the requirement of this subdivision, it is necessary for an organization to establish that it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests.

(iii) Since each of the purposes specified in subdivision (i) of this subparagraph is an exempt purpose in itself, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes. If, in fact, an organization is organized and operated exclusively for an exempt purpose or purposes, exemption will be granted to such an organization regardless of the purpose or purposes specified in its application for exemption. For example, if an organization claims exemption on the ground that it is "educational," exemption will not be denied if, in fact, it is "charitable."

2 Charitable defined. The term "charitable" is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, welfare by organizations designed to accomplish any of the above purposes, or

to lessen neighborhood tensions;
to eliminate prejudice and discrimination;
to defend human and civil rights secured by law; or
to combat community deterioration and juvenile delinquency.

The fact that an organization which is organized and operated for the relief of indigent persons may receive voluntary contributions from the persons intended to be relieved will not necessarily prevent such organization from being exempt as an organization organized and operated exclusively for charitable purposes.

The fact that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under section 501(c)(3) so long as it is not an "action" organization of any one of the types described in paragraph (c)(3) of this section.

3 Educational defined:

In general. The Term "educational," as used in section 501(c)(3), relates to:

(a) the construction or training of the individual for the purpose of improving or developing his capabilities; or
(b) the instruction of the public on subjects useful to the individual and beneficial to the community.

An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.

Examples of educational organizations. The following are examples of organizations which, if they otherwise meet the requirements of this section, are educational:

Example (1) An organization, such as primary or secondary school, a college, a professional or trade school, which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on.

Example (2) An organization whose activities consist of presenting public discussion groups, forums, panels, lectures, or other similar programs. Such programs may be on radio or television.

Example (3) An organization which presents a course of instruction by means of correspondence or through the utilization of television or radio.

Example (4) Museums, zoos, planetariums, symphony orchestras, and other similar organizations.

4 Testing for public safety defined. The term "testing for public safety," as used in section 501(c)(3), includes the testing of consumer products, such as electrical products, to determine whether they are safe for use by the general public.

5 Scientific defined.

(i) Since an organization may meet the requirements of section 501(c)(3) only if it serves a public rather than a private interest, a "scientific" organization must be organized and operated in the public

interest (see subparagraph (1)(ii) of this paragraph). Therefore, the term "scientific," as used in section 501(c)(3), includes the carrying on of scientific research in the public interest. Research when taken alone is a word with various meanings; it is not synonymous with "scientific"; and the nature of particular research depends upon the purpose which it serves. For research to be "scientific," within the meaning of section 501(c)(3), it must be carried on in furtherance of a "scientific" purpose. The determination as to whether research is "scientific" does not depend on whether such research is classified as "fundamental" or "basic" as contrasted with "applied" or "practical." On the other hand, for purposes of the exclusion from unrelated business taxable income provided by section 512(b)(9), it is necessary to determine whether the organization is operated primarily for purposes of carrying on "fundamental," as contrasted with "applied," research.

(ii) Scientific research does not include activities of a type ordinarily carried on as an incident to commercial or industrial operations, as, for example, the ordinary testing or inspection of materials or products or the designing or construction of equipment, buildings, etc.

(iii) Scientific research will be regarded as carried on in the public interest:

If the results of such research (including any patents, copyrights, processes, or formulae resulting from such research) are made available to the public on a nondiscriminatory basis;

If such is performed for the United States, or any of its agencies or instrumentalities, or for the State or political subdivision thereof; or

If such research is directed toward benefiting the public. The following are examples of scientific research which will be considered as directed toward benefiting the public, and, therefore, which will be regarded as carried on in the public interest:

Example (1) Scientific research carried on for the purpose of aiding in the scientific education of college or university students.

Example (2) Scientific research carried on for the purpose of obtaining scientific information, which is published in a treatise, thesis, trade publication, or in any other form that is available to the interested public.

Example (3) Scientific research carried on for discovering a cure for a disease.

Example (4) Scientific research carried on for the purpose of aiding a community or geographical area by attracting new industry to the community or area or by encouraging the development of, or retention of, an industry in the community or area. Scientific research described in this subdivision (c) will be regarded as carried on in the public interest even through such research is performed pursuant to a contract or agreement under which the sponsor or sponsors of the research have the right to obtain ownership or control of any patents, copyrights, processes, or formulae resulting from such research.

(iv) An organization will not be regarded as organized and operated for the purpose of carrying on scientific research in the public interest and, consequently, will not qualify under section 501(c)(3) as a "scientific" organization, if:

(a) Such organization will perform research only for persons which are (directly or indirectly) its creators and which are not described in section 501(c)(3), or

(b) Such organization retains (directly or indirectly) the ownership or control of more than an insubstantial portion of the patents, copyrights, processes, or formulae resulting from its research and does not make such patents, copyrights, processes, or formulae available to the public. For purposes of this subdivision, a patent, copyright, process, or formula shall be considered as made available to the public if such patent, copyright, process, or formula is made available to the public on a nondiscriminatory basis. In addition, although one person is granted the exclusive right to the use of a patent, copyright, process or formula, such patent, copyright, process or formula shall be considered as made available to the public if the granting of such exclusive right is the only practicable manner in which the patent, copyright, process, or formula can be utilized to benefit the public. In such a case, however, the research from which the patent, copyright, process, or formula resulted will be regarded as carried on in the public interest (within the meaning of subdivision (iii) of this subparagraph) only if it is carried on for a person described in subdivision (iii)(b) of this subparagrph or if it is scientific research described in subdivision (iii)(c) of this subparagraph.

(v) The fact that any organization (including a college, university, or hospital) carries on research which is not in furtherance of an exempt purpose described in section 501(c)(3) will not preclude such organization from meeting the requirements of section 501(c)(3) so long as the organization meets the organizational test and is not operated for the primary purpose of carrying on such research (see paragraph (e) of this section, relating to the organizations carrying on a trade or business). See paragraph (a)(5) of 1.513-2, with respect to research which constitutes an unrelated trade or business, and section 512(b)(7), (8), and (9), with respect to income derived from research which is excludable from the tax on unrelated business income.

(vi) The regulations in this subparagraph are applicable with respect to taxable years beginning after December 31, 1960.

APPENDIX 7

AUSTRALIAN INCOME TAX ASSESSMENT ACT

In Australia the concept of charity has its broad common law meaning in the tax section exempting the income of certain organizations from tax, but has a much more restricted meaning in the section providing for the deductibility of contributions to charities, see generally, Taxation Review Committee Full Report (Asprey Report) (1975), ch. 25, K.W. Ryan, Manual of the Law of Income Tax in Australia, 5th ed. (Sydney: Law Book Co., 1980), pp. 37-38, 1979-80.

To be qualified as a charity entitled to receive tax deductible contributions, an organization must be specifically listed in section 78(1) of the Income Tax Assessment Act. The last general review of the list was made in 1962. No new categories have been added since then. As a matter of interest, it might be noted that institutions of a purely religious nature are not included in the list and are not regarded as charitable for tax purposes. Section 78(1) of the Australian Income Tax Assessment Act is reproduced below.

Enactment

78(1) The following shall, subject to section 77B, sub-section (II) of section 77D and section 79C, be allowable deductions:

(a) (Gifts) Gifts (not being testamentary gifts) of the value of two dollars and upwards of money or of property other than money which was purchased by the taxpayer within 12 months immediately preceding the making of the gift, made by the taxpayer in the year of income to any of the following funds, authorities or institutions in Autralia:

(i) a public hospital, or a hospital which is carried on by a society or association otherwise than for the purposes of profit or gain to the individual members of that society or association;

(ii) a public benevolent institution;

(iii) a public fund establishment before 23rd October, 1963 and maintained for the purpose of providing money for hospitals or institutions specified in sub-paragraph (i) or (ii), or for the establishment of such hospitals or institutions, or a public fund establishment and maintained for the relief of persons in Australia who are in necessitous circumstances;

(iv) a public authority engaged in research into the causes, prevention or cure of disease in human beings, animals or plants, where the gift is for such research, or a public institution engaged solely in such research;

(v) a public university or a public fund for the establishment of a public university;

(vi) a residential educational institution affiliated under statutory provisions with a public university, or established by the Commonwealth;

(vii) a public fund established and maintained for providing money for the construction or maintenance of a public memorial relating to the war that commenced on 4 August 1914 or to the war that commenced on 3 September 1939, being a fund that was established on or before 21 August 1973;

(viii) a public institution or public fund established and maintained for the comfort, recreation or welfare of members of the armed forces of any part of His Majesty's dominions, or of any allied or other foreign force serving in association with His Mastery's armed forces;

(ix) the Commonwealth or a State, when made for purposes of defence;

(x) a university, college, institute, association or organization which is an approved research institute for the purpose of section 73A, where the gift is for purposes of scientific research as defined in that section;

(xi) the United Nations Appeal for Children;

(xii) the Queen Elizabeth the Second Coronation Gift Fund;

(xiii) the Australian Elizabethan Theatre Trust;

(xiv) the Australian Academy of Science;

(xv) a public fund established and maintained exclusively for providing money for the acquisition, construction or maintenance of a building used or to be used as a school or college by a government or public authority or by a society or association which is carried on otherwise than for purposes of profit or gain to the individual members of that society or association;

(xvi) the Duke of Edinburgh's Study Conference Account maintained by the Department of Productivity;

(xvii) the Australian and New Zealand Association for the Advancement of Science;

(xviii) the Australian Administrative Staff College;

(xix) the Commonwealth, when made for the purposes of research in the Australian Antarctic Territory;

(xx) the Royal Australasian College of Surgeons;

(xxi) the Royal Australasian College of Physicians;

(xxii) the Australian Regional Council of the Royal College of Obstetricians and Gynaecologists;

(xxiii) the New South Wales College of Nursing;

(xxiv) the College of Nursing, Australia;

(xxv) the Council for Christian Education in Schools;

(xxvi) the National Trust of Australia (New South Wales), the National Trust of Australia (Victoria), The Natonal Trust of Queensland, The National Trust of South Australia, The National Trust of Australia

(W.A.), the National Trust of Australia (Tasmania), The National Trust of Australia (Northern Territory), the National Trust of Australia (A.C.T.) and the Australian Council of National Trusts;

(xxvii) a public library, public museum or public art gallery, or an institution consisting of a public library, public museum and public art gallery or any two of them;

(xxviii) the Sydney Opera House Appeal Fund;

(xxix) the Sidney Myer Music Bowl Trust;

(xxx) the Industrial Design Council of Australia;

(xxxi) a public fund established and maintained exclusively for the purpose of providing money to be used in furnishing persons in Australia with marriage guidance through a voluntary organization or through a branch or section of such an organization, being an organization, branch or section that the Attorney-General, upon being satisfied that the organization, branch or section is willing and able to engage in marriage guidance and that marriage guidance constitutes or will constitute the whole or the major part of its activities, has approved in writing for the purposes of this sub-paragraph.

(xxxii) the Australian National Committee for World Refugee Year;

(xxxiii) the Council for Jewish Education in Schools;

(xxxiv) the Art Gallery Society of New South Wales;

(xxxv) the Productivity Promotion Council of Australia;

(xxxvi) the Australian Postgraduate Federation in Medicine, the College of Radiologists of Australia, the Australian College of General Practitioners and the College of Pathologists of Australia, where the gift is for the purpose of education or research in medical knowledge or science;

(xxxvii) the Ian Clunies Ross Memorial Foundation;

(xxxviii) the Australian National Committee for the Freedom from Hunger Campaign;

(xxxix) the Australian Institute of International Affairs;

(xl) the Australian National Travel Association;

(xli) the National Safety Council of Australia;

(xlii) the Winston Churchill Memorial Trust;

(xliii) (Omitted by No. 124 of 1980);

(xliv) the Australian Conservation Foundation Incorporated;

(xlv) the Queen Elizabeth II Silver Jubilee Trust for Young Australians;

(xlvi) The Australiana Fund;

(xlvii) the World Wildlife Fund Australia;

(xlviii) The Sir Robert Menzies Memorial Trust;

(xlix) a public fund established and maintained by a Roman Catholic archdiocesan or diocesan authority exclusively for the purpose of providing religious instruction in government schools in Australia;

(l) the I.D.E.C. Kampuchean Relief Appeal;

(li) The Australian Red Cross East Timor Appeal;

(lii) the Child Accident Prevention Foundation of Australia;

(liii) The Australian College of Obstetricians and Gynaecologists;

(liv) a college of advanced education within the meaning of the Tertiary Education Commission Act 1977);

(lv) an institution that is certified by the Minister for Education, by instrument signed by him, to be a technical and further education institution within the meaning of the Tertiary Education Commission Act 1977, where the gift is for certified purposes of the institution or for the provision of certified facilities for the institution;

(lvi) an institution that is a prescribed Commonwealth institution within the meaning of the Tertiary Education Commission Act 1977;

(lvii) a residential educational institution that is affiliated with an institution to which subparagraph (liv) or (lvi) applies;

(lviii) the Marcus Oldham Farm Management College, where the gift is for certified purposes of the college or for the provision of certified facilities for the college;

(lix) a public fund established and maintained exclusively for the relief of persons affected by earthquakes in Italy.

or to the public fund established and maintained under a will or instrument of trust exclusively for the purpose of providing money, property or benefits to or for funds, authorities or institutions referred to, and for the purposes (if any) referred to, in any of the subparagraphs of this paragraph, or for the establishment of such funds, authorities or institutions, being a public fund as to which the Commissioner is satisfied that the terms of the will or instrument of trust are such that any moneys (including income derived from investments and proceeds of the realization of investments) paid or accrued to the fund as a direct or indirect result of the particular gift and not applied for the purposes of the fund many not be invested by the trustee otherwise than in a manner in which trustees are permitted by an Act, a State Act or a law of the Territory of the Commonwealth to invest trust moneys without special authorization;

APPENDIX 8

RECENT NON-TAX CASES RELATING TO THE DEFINITION OF CHARITY

1 Maria F. Ganong Old Folks Home v. Minister of Municipal Affairs (1981), 37 N.B.R. (2d) 225, 97 A.P.R. 225 (C.A.).

Cause of Action

The Ganong Old Folks Home brought an application that it was exempt from real property taxation under the New Brunswick Assessment Act, which exempted from tax "that portion of real property owned and occupied by charitable societies, trusts or organizations ... and used solely for charitable activities ..."

Issue

Whether "relief of aged" is a charitable purpose or whether to be charitable such relief must apply only to the aged who are poor. In particular, whether an old folks' home was a charitable organization notwithstanding that some residents were not poor and some paid fees.

Holding

In holding the old folk's home to the charitable, Hughes C.J.N.B. stated that "Formerly the courts held the view that if a gift for the benefit of aged persons were to be upheld there must be present an element of poverty ... In recent years, however, the English Courts have departed from that view and I think it is now recognized the words "aged, impotent, and poor" in the preamble to he Statute of Elizabeth are to be read disjunctively so that aged persons need not also be poor to come within the preamble ... " (p. 236). In reaching this conclusion the judge averted to changing social conditions. He noted, "Social conditions have vastly changed in the province since 1934 when Mrs. Ganong's will took affect. Social security and other financial assistance provided by government and otherwise have nearly extinguished the class of persons who formerly were rearded as "poor" and "needy." (P. 236.)

2 Re Ross (1980), 28 N.B.R. (2d) 611 (Q.B.T.D.)

Cause of Action

Application for an order directing a cy-près plan for the administration of trust funds. A testator had bequeathed a portion of his residuary estate to a hospital, one-half of the funds to be used to provide free beds, the other to offset operating costs. By the time the bequest was payable,

these hospital services had become fully funded by the government. The successor to the beneficiary hospital sought a declaration that the trust funds were charitable and should be applied cy-près to renovations and new construction relating to the hospital.

Issue

Whether a gift to a hospital is charitable?

Holding

Stratton J. held that a gift to a hospital is charitable. He appeared to base this holding on two alternative grounds. First, that a gift to a hospital is "per se charitable for it falls by analogy within the phrase 'the relief of the impotent' in the Statute of Elizabeth." (p. 615.) Second, that such a gift fell within Lord Macnaughten's fourth category in Pemsel's case, namely a gift "for other purposes beneficial to the community." He stated, "the provision of medical care for the sick is, in modern times, accepted as a public benefit suitable to attract the privileges, given to charitable institutions." (p. 616.)

3 Prince Edward Island Public Service Ass'n. v. City of Charlottetown (1977), 12 N. & P.E.I. R. 526 (R.E.I.S.C.).

Cause of Action

The plaintiff sought a declaration that its proposed use of property was within a zoning by-law permitting the property within the particular area to be used for "a hospital, or sanitorium, or an institution for philanthropic or charitable uses."

Issue

The plaintiff was a public service labor union which wished to use the property for offices, committee rooms and boardrooms. Whether the union was engaged in charitable activities within the meaning of the bylaw.

Holding

The judge held that the organization was not charitable. He found that it served no public benefit. He reviewed both the objects of the corporation and some of its activities and concluded that it was "for all practical purposes a trade union acting for its members to protect their interests in all phases of employment." (P. 538).

4 Re St. Catherine's House (1977), 2 A.R. 337 (C.A.).

Cause of Action

Application by the Synod of the Diocese of Edmonton for directions with regard to the disposition of proceeds received upon expropriation of property the Synod had been holding in trust. The property consisted of a home for girls. If the trust was charitable the property would be distributed according the the cy-près doctrine. If it was not, the property would revert to the legatees entitled to the residuary property of the testator's estate. (The testator who originally gave the property to the Synod on trust.)

Issue

Whether a gift "to operate a home or hostel for Anglican girls within the Diocese of Edmonton with particular concern for those of low earning ability who wish to become teachers and clerks" is for a charitable purpose?

Holding

The judge began by noting that the preamble to the Statute of Elizabeth "set the guidelines for the definition of the term charitable" (p. 341). But that it is supplemented by Lord Macnaughten's classification in Pemsel's case. The judge then stated, "Having regard to the liberal interpretation which the courts have over the years given to the word 'charity' I am of the view that the nature of the aid ... is clothed with the characteristics which place it within the spirit of the Statute of Elizabeth and within the fourth category of Lord Macnaughten's classification" (p. 348).

He found that it was within the spirit of the Statute of Elizabeth since, "the words young tradesmen in the preamble to the statute lend themselves to interpretation in the broad context so as to embrace girls who aspire to be teachers and girls who take employment as clerks and assistants in stores" (p. 348). Also with respect to Lord Macnaughten's fourth category the judge noted "The home was surely established to benefit the poor who aspire to be teachers and clerks and for that reason its establishment was beneficial to the community in much the same way as a rest home for teachers was held to be for the public benefit" (p. 349).

5 Co-op College of Canada v. Sask. Human Rights Commission, (1976) 2 W.W.R. 84, 64 D.L.R. (3d) 531 (Sask. C.A.).

Cause of Action

Application for prohibition to prohibit the Sask. Human Rights Commission from proceeding with a formal inquiry. Jurisdiction of the Commission was dependent on the College being an "employer" within the meaning of The Fair Employment Practices Act, RSS 1965, c. 293. The definition of "employer" excluded "an exclusively charitable, philanthropic,

fraternal, religious or social organization or corporation that is not operated for private profit ... "

Issue

Whether the Co-operative College of Canada was an "exclusively charitable organization"?

Holding

The court held it was not, for three reasons: (1) Although the college had educational purposes, these were largely to educate its members, and thus it achieves a private not a public benefit. (2) A specific object of the College was to encourage and further specify economic principles, namely, "co-operative and credit union principles." Economic objects are not charitable purposes for the same reason political purposes are not: the court has no way of judging whether there is a public benefit. (3) The College's objects contained some political objects. The court was "plainly to influence the Legislature, or Parliament, as well as administrative and judicial bodies, to change existing laws, enact new laws or to resist any such change or enactment of new laws so that the interests of co-operatives and credit unions may be protected." (P. 92.) This was found to be held to be a political object and therefore made it "impossible to say that the college is an 'exclusively' charitable organization, even if the remaining objects are capable of being construed as charitable." (P. 92.)

Comment

It is interesting to note that the Department of Revenue had registered this organization as a charity under the Income Tax Act.

6 Re Denison (1974), 2 O.R. (2d) 308, 42 D.L.R. (3d) 652 (H.C.).

Cause of Action

A testator by his will directed the residue of his estate to be paid to the Law Society of Upper Canada in trust to be applied "both as to capital and income ... for the relief of impoverished or indigent members of the Law Society." Since the income exceeded the amount necessary for this purpose, the Law Society sought to apply part of the income to the impoverished student members of the society enrolled in the bar admission course. They applied for a construction of the will and in the alternative asked the court to apply the doctrine of cy-près.

Issue

Whether a gift "for the relief of impoverished members of the Law Society and their wives, widows and children" is a charitable purpose?

Holding

The main holding of the case was that members of the Law Society could be construed to be members of the society. However, the court also held that the gift was charitable on the grounds that it was for the relief of poverty. The judge noted, "gifts to any group of people for the relief of poverty is still an anomaly in the general law relating to (charities) and such gifts do not require the element of public benefit" (O.R. at 311, D.L.R. at 655).

7 Jones et al. v. Eaton Co. et al., (1973) S.C.R. 635, 35 D.L.R. (3d) 97.

Cause of Action

Application for construction of will. The testator bequeathed a legacy "to the Executive Officers of the T. Eaton Company Limited, Toronto, to be used by them as a trust fund for any needy or deserving Toronto members of the Eaton Quarter Century Club ... "

Issue

Whether the words "or deserving ... member" in the will referred to such qualities as merit, industry or intelligence" and therefore disqualified the gift as charitable?

Holding

1 The Supreme Court confirmed that a trust for the relief of poverty can be charitable even though it does not apply to every member of the public. That is, in a trust for the relief of poverty the element of public benefit is not required.

2 As used in the will the phrase "or deserving" meant a person who although not actually poverty stricken was nevertheless in a state of financial depression, perhaps due to a sudden emergency. It did not refer to merit, industry, intelligence and so on. Therefore the gift was for the relief of poverty.

8 Re Ryan; Can. Permanent Trust Co. v. MacFarlane, (1972) 4 W.W.R. 593, 27 D.L.R. (3d) 480 (B.C.C.A.).

Cause of Action

Application for construction of a will. The dependants of testator received life interests under the will. Upon their death, the capital was to be held in trust for homes described below. The dependants challenge the validity of the residuary bequest and assert that the fund should go as upon an intestacy.

Issue

Whether a discretionary gift to "Protestant homes or institutions for the care and welfare of children" is a charitable purpose? The dependants argued that the plain words of the gift are broad enough to extend to commerical enterprises and it is not limited to homes helping needy children. Therefore, the gift cannot be regarded as purely charitable.

Holding

The gift was for the relief of poverty and therefore charitable: (1) The clear intent of the testator was to provide for homes for needy children and not for commercial or recreational institutions. (2) The fact that the gift was available only to Protestant children does not prevent it from being treated as charitable under the heading relief of poverty.

9 Re Windsor Medical Services Inc., (1971) 2 O.R. 141, 17 D.L.R. (3d) 233 (H.C.).

Cause of Action

Application by the Public Trustee under the Charities Accounting Act for a declaration that Windsor Medical Services Inc. held its property in trust for charitable purposes. The corporation was a non-profit corporation that acted as essentially a private OHIP scheme for its members. After the inception of Medicare, the members of the corporation sought to windup the corporation and distribute the proceeds among its membership.

Issue

Whether a non-profit corporation formed by a group of medical doctors to provide medical services to members of the public who paid a premium was charitable?

Allegation of the Public Trustee

The Public Trustee submitted that the corporation was established for "the promotion of health on a non-profit basis, the advancement of medical science, the encouragement of medical research, the encouragement of preventive medicine." He argued that all of these are charitable purposes considered to be "beneficial to the community" within the fourth head of Lord Macnaughten's classification in Pemsel's case.

Holding

Although the purposes stated might be charitable, in this case the organization was not charitable since it was established for the self-interest of its members. Furthermore, it was not for a public benefit since "The public did not have a right to demand membership in the corporation" (O.R. at p. 150).

10 Re Brooks (1969), 68 W.W.R. 132, 4 D.I.R. (3d) 694 (Sask. Q.B. Chambers).

Cause of Action

Application for a declaration as to the validity of a will.

Issue

Whether a gift "to the work of the Lord" was charitable or whether it was void for uncertainty.

Holding

In holding that the gift was charitable on the grounds it was for the advancement of religion the judge cited both the Statute of Uses, 1601 and Pemsel's case.

11 The Minister of Municipal Affairs v. St. John Y's Mens' Property Co. Ltd. (1969) 1 N.B.R. (2d) 411 (N.B.S.C., App. Div).

Cause of Action

Appeal from decision of Appeals granting respondent an exemption from taxation under the Assessment Act, S.N.B. 1965-65, c. 110. Sub-paragraph 4(1)(d)(ii) exempted "real property of charitable societies, trusts or organizations ... all the resources of which are devoted to charitable activities ... "

Issue

Whether a corporation whose only asset is land that it makes available without charge to the local YMCA club to operate a boy's camp is charitable.

Holding

Following two quotations from Pemsel's case, Ritchies J.A., held that "I am satisfied the Company is, without charge, making its land available for the operation of the camp, a charity beneficial to the Saint John community."

12 Re Armstrong (1969), 7 D.L.R. (3d) 36 (N.S.S.C.).

Cause of Action

Executor and trustee under a will brought action for construction of a will and advice regarding questions that arose on the administration of the will.

Issue

Whether a direction that the trustee could elect to make payments "to and for the benefit of the said church, and ancillary projects ... " operated to invalidate the otherwise charitable gift.

Holding

There was no question that except for the phrase "and ancillary projects" the trust was charitable being for the advancement of religion. The court construed that phrase "ancillary projects" to relate to activities of the church and therefore held that the trust was for exclusively charitable objects.

13 Re Wedge (1968), 63 W.W.R. 397, 67 D.I.R. (2d) 433 (B.C.C.A.).

Cause of Action

Application for construction of a will. Next of kin challenged validity of bequest of entire estate on trust "for some needy displaced family of European origin ... who wishes to make a new start in life in Canada ... "

Issue

Whether a gift "to some needy displaced family of European origin who wishes to make a new start in Canada" is for a charitable purpose? If the trust was not charitable, it would fail for uncertainty. The class of beneficiaries could not be ascertained.

Holding

This was a charitable trust "for the relief of poverty." Therefore, it involved an element of public benefit even though only one family might benefit from it. In holding it charitable the judge noted "The determination of the question whether this trust is for a charitable purpose depends first upon deciding whether it comes within one of the four principal divisions of charity in the legal sense as defined ... " in Pemsel's case (p.415).

14 Re Jacques (1967), 65 W.W.R. 136, 63 D.L.R. (2d) 673 (B.C.S.C.).

Cause of Action

Application for construction of a will. If the trust was not for a charitable purpose, it was too vague to be enforced.

Issue

Whether a gift to "be distributed to finance community projects" is for a charitable purpose?

Holding

The bequest was void for uncertainty. Although it showed an intention to establish a trust for the benefit of the community, it did not necessarily show an intention to benefit the community only in ways which the law regards as charitable. Dryer J. relied upon Pemsel's case, as interpreted by Lord Simonds in Williams Trustees v. IRC (1947) A.C. 447, 455, in holding that "all trusts for the benefit of the community are not necessarily charitable." In the course of giving his reasons for judgment he also admitted "It is difficult if not impossible to reconcile all the decisions dealing with what constitutes a charitable bequest."

15 Re Andrae; Sims v. Public Trustee (1967), 61 W.W.R. 182 (Alta. S.C.).

Cause of Action

Application for construction of a will. If not charitable the gift was void for uncertainty.

Issue

Whether a gift "unto any charitable group, organization or society which provides assistance or support for unmarried mothers" is a charitable purpose?

Holding

The gift was held to be charitable on the grounds that it was "of benefit to the community." The judge stated that "The question as to whether or not the bequest referred to above is charitable must be considered starting from the preamble to the ancient statute of Charitable Uses ... " (p. 183). However, he went on to say that "a charitable purpose must be defined strictly in regard to present day circumstances." In making an analogy to a previous case he reasoned, "In my respectful opinion the assistance and support of unmarried mothers is in the same general category as the providing of 'a home for those who need a home,' ... because it tends in some cases to provide relief from destitution and in others from suffering and distress" (p. 185). The judge took judicial notice of the problems of unwed mothers in Canada, and the fact that their children cause special problems to the agencies concerned with placing them for adoption and so on.

16 Re Etter (1967), 61 W.W.R. 427, 65 D.L.R. (2d) 398 (Sask. Q.B.).

Cause of Action

Application for construction of a will. If not charitable, the gift would be void for uncertainty.

Issue

Whether there was a valid charitable trust created by the will? Trustee was to pay income of trust for five years "to such charitable objective or objectives in the Community of Imperial as may be designated by my Trustee after consultation with the Mayor ... " There was some doubt about the exact identification of the Community of Imperial.

Holding

Once a charitable trust is established and a beneficiary designated a gift, it will not fail for uncertainty, and extrinsic evidence will be admitted to remove any doubt as to the identity of the beneficiary. Here the admission of extrinsic evidence clearly established that the testator intended to refer to the town of Imperial (a town in Sask.).

17 Re Schechter (1965) S.C.R. 784, 52 W.W.R. 510, 53 D.L.R. (2d) 577.

Cause of Action

Next-of-kin challenge a bequest of residuary of estate to the Jewish National Fund to be held on trust "for the purpose of a tract or tracts of the best lands obtainable, in Palestine, the United States of America or any British Dominion, and the establishment thereon of a Jewish colony or colonies ... "

Issue

Whether the identified use is charitable.

Holding

In the trial court the gift was upheld as charitable. Pemsel's case was quoted but not discussed. The trial judge placed some reliance on an analogy to charities for the prevention of cruelty against animals. He reasoned "If, therefore, it be charitable to arouse in humanity kindness, etc., towards dumb animals, then surely it can be no less a charity to provide for the homeless and destitute or the disinherited Jew" ((1963), 41 W.W.R. 392, 398 (B.C.S.C.)).

This judgment was, however, reversed in the Court of Appeal. Lett C.J.B.C. concluded that the respondent, the Jewish National Fund, did not "establish that the trust was for a religious purpose, or for the benefit of the community or some class of the community, or that it was a trust for the benefit of poor Jews." ((1964), 46 W.W.R. 577, 43 D.L.R. (2d) 417 (B.C.C.A.).) This holding was affirmed in the Supreme Court.

18 Touchet v. Blais (1962), 39 W.W.R. 587 (Sask. C.A.).

Cause of Action

The brother and father of the deceased challenged the validity of bequest to "Mgr. Leo Blais, Bishop of Prince Albert, for his works, but such of the works as would aid the cause of the French Canadians in his diocese."

Issue

Whether the bequest was so uncertainly worded as to preclude the creation of any trust, charitable or otherwise?

Holding

In the Sask. C.A. it was held that had the gift ended with "for his works," the charitable intention would be presumed by the nature of the Bishop's office. The addition of the phrase starting with "but," however, destroys any such implication. That clause expands the scope of the trust so that it cannot be said to be limited to the ecclesiastical purposes inherent in the office of the bishop.

The Supreme Court reversed the court of appeal judgment. The Supreme Court followed a number of cases which had held, in effect, that a gift could be charitable by virtue of the office of the trustee. However, the court admitted that in the area, "Fine distinctions have been made from time to time and it is not always easy to see why in one case a court would decide that a case fell on the charitable side of the line and in another case on the non-charitable side" (p. 360).

19 Re Forgan (1961), 29 D.L.R. (2d) 585, 34 W.W.R. 495 (Alta. S.C.).

Cause of Action

Action for construction of a will. Public trustee contended that a gift to establish "a home for the care of the children of others, orphans, wards of the province or children whose parents are unable to provide proper homes ... " was not charitable.

Issue

1 Whether a home for wards of the province and therefore receives government support can be charitable?

2 Whether "a home for the care of children of others" is so broad as to extend to non-charitable uses?

Holding

1 The receipt of government aid is not sufficient to disqualify an organization as charitable.

2 A gift to a home for children is charitable as analogous to gifts to homes for other purposes that have been held to be charitable within the Statute of Elizabeth. "The expression 'children of others' as used in the will should, as used in the will should, I think, be construed as the testatrix meant it, namely 'poor children'" (D.L.R. at 591).

TAX CASES INVOLVING THE DEFINITION OF CHARITY

1 Rothery v. M.N.R., (1970) Tax A.B.C. 1084, 70 D.T.C. 1967.

Appeal

The taxpayer appealed an income tax assessment on the grounds that a payment to his son who was in financial difficulties was a charitable deduction.

Holding

"(T)he underlying principle which governs every charitable gift ... is that such gift stands to benefit the community as a whole or some cross-section thereof; ... accordingly no gift can properly be treated as charitable ... if it is given to a person or persons who are specifically identified by the donor or who are ascertainable ..." (Tax A.B.C. at 1086).

2 Towle v. M.N.R., (1966) C.T.C. 755, 67 D.T.C. 5003 (S.C.C.).

Appeal

Appeal from an assessment under the Estate Tax Act.

Issue

Whether a gift made to the Medical Alumnae Assoc. of the University of Toronto (for the purpose of establishing a student loan fund) was made for a charitable purpose?

Holding

The Medical Alumnae Assoc. was "constituted exclusively for charitable purposes." The court reviewed the objects of the association including "the promotion and enlargement of the usefulness and influence of the provincial university" and "generally to promote the science and art of medicine" and held that its charitable purposes were "the advancement of education." The Supreme Court also noted that in determining whether an organization is "constituted exclusively for charitable purposes" ... the court must look not only at the stated purposes of the organization in its constitution, but also at the activities to which the association was actually devoted (p. 762). After reviewing all the evidence as to what the association actually did the Supreme Court held that "by far the greatest part of the association's efforts during recent years has been devoted to charitable purposes," namely, the advancement of education.

3 Watt Estate v. M.N.R., 64 D.T.C. 488, 36 Tax A.B.C. 40.

Appeal

Appeal of assessment under the Estate Tax Act.

Issue

Whether the Edmonton Lions Club was "constituted exclusively for charitable purposes" within the meaning of the Estate Tax Act?

Holding

Although the organization undertook various community projects, the sole purpose of many of its activities was to promote good fellowship and general sociability. Therefore it was not "constituted exclusively for charitable purposes."

4 Campus Co-operative Residence, Incorporated v. M.N.R., 63 D.T.C. 857, 33 Tax A.B.C. 305.

Appeal

The cooperative appealed an income tax assessment on the grounds that it was a charitable organization.

Issue

Whether a cooperative housing residence is a charity?

Holding

It was not a charity. The cooperative was operated for the direct benefit of its members. It could not be said that the purpose of the organization was to advance education in general: "It is too personal and restricted to be regarded as the advancement of education in general" (p.313).

5 Hobson v. M.N.R., (1959), 59 D.T.C. 211, 21 Tax A.B.C. 433.

Appeal

The taxpayer appealed an income tax assessment on the grounds that his contribution to the Audubon Society was to a charitable organization.

Issue

Whether the Audubon Society of Canada was a charitable organization under the Income Tax Act?

Holding

The society was not serving a charitable purpose. The main purpose of the society was to stimulate an interest in the need for the conservation of natural resources. It pursued

this objective largely by publishing a bi-monthly magazine. In holding the society not to be a charity on the grounds of the advancement of education, the chairman of the Tax Appeal Board Cecil L. Snyder, noted: "the circulation of this magazine would average only 2,000 copies in each province of Canada and even then at two-month intervals. It is not conceivable that this meagre circulation coverage could exert a very wide influence. The thought also arises that the Audubon Society of Canada may, in this small way, be duplicating what is already being effectively carried out in a much wider sphere in the field of conservation by the departments of the several provincial governments vitally interested in conservation: "the preservation of wildlife and the conservation of our natural resources" (p. 438).

CHAPTER 2 POLITICAL ACTIVITIES OF CHARITIES

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INTRODUCTION

Although the precise limits of the prohibition are unclear, under the present law as a general proposition charities are prohibited from engaging in political activities. A number of individuals and organizations have recently suggested that this ban on political activities should be lifted.[1] This was the major concern of the National Advisory Council on Voluntary Action to the Government of Canada in recommending that "The federal government re-examine the definition of charity and substitute a legal definition more closely in keeping with the reality of voluntary activities."[2]

Presumably, charities must be allowed to engage in some activities that might be broadly described as political. Many if not most charities now engage in political activities (broadly defined) and there would be no way of preventing them from doing so, nor would it be good policy. For example, it would be almost unthinkable not to allow the Cancer Society, whose major purpose is to find a cure for the disease, to present facts, figures and opinions to the government on matters affecting the work of the orgnanization, or to advertise its findings with a view to influencing public opinion. The same might be said for most large charitable organizations. Their continued involvement in the political process is important both to the charities and to the government.

Even though it would appear to prohibit charities from engaging in any political activities, the present law and its administration has not caused undue hardship. To put the problem in some perspective, out of the almost 50,000 registered charities, Revenue Canada sends out only a couple of dozen letters each year to particular charities, cautioning them about engaging in political activities. (Revenue Canada's practice is normally to communicate its concerns to offending charities before deregistering.) These cases come to Revenue Canada's attention through their newspaper clipping service or informers. Of these cases, in the last nine years only two have resulted in deregistration. In one case Revenue Canada took the view that the organization's activities constituted propaganda not education, in the other, the charity was endorsing political candidates. Appeals are underway in both cases.

Of course this is not an entirely accurate indication of the effects of the present law. Revenue Canada does refuse to register at least a small percentage of applications because of their political objects. Also, the fact that more controversy is not generated might simply indicate that charities are frightened from undertaking political activities that they think they should be engaging in, or that charities which would otherwise oppose Revenue's enforcement practices do not have the expertise, time or

money to do so, or that the stakes are not high enough for them to do so. Probably the explanation embraces all of those considerations.

There are a number of reasons why the present law has not created more difficulties than it has. First, it is not enforced with any rigor. Instances of charities engaging in political activities abound. Recently, for example, the churches and a number of wildlife federations have been involved in the center of a number of political issues. All major Canadian charities would undoubtedly admit to engaging in political activities.[3] Another reason that the present law has not caused serious difficulties is that some of the 'controversial' organizations in the voluntary sector, such as the Canadian Civil Liberties Union, establish two non-profit corporations. One, which involves primarily 'educational' activities, will be registered as a charity. The other, which will engage in 'political' activities, will remain unregistered. The use of this split-up technique provides an organization with the ability to insulate its charitable activities from political 'taint.' Of course, deductible contributions must be spent for charitable purposes. However, where control is interlocking, the use of such funds is difficult to trace.

In spite of the fact that the present law has not caused serious difficulties, some groups continue to call for reform. The pressure for reform comes largely from those who think that charities should be under no restrictions with respect to political activities, those who admit that there should be some limitations on such activities but want clearer guidelines as to what activities are prohibited and those who are concerned about the apparently selective enforcement of the present law.

The purpose of this paper is to provide background legal and policy information relating to the issue of the political activities of charities. The materials reveal that there are no easy answers to the problem. As a recent English committee established to inquire into the voluntary sector noted "It became clear from the outset of our inquiry that the relationship between charitable and political activity would be one of the most important and difficult topics for us to consider."[4]

The paper is divided into eight parts. Part I on background reveals that this subject has been a matter of concern in Canada only in the last five years. To provide context for the historical and policy parts of the paper it reviews the recent events that have brought the subject to the public's attention. It also reviews concerns that charities, members of Parliament, and the press have expressed about the present law.

Part II explores the historical development of this area of the law. Among other things, it reveals the surprisingly fragile doctrinal base for the present law, and the social context out of which the law developed.

Part III explores the case law on the subject in more detail. It is not intended to be a complete analytical description of the law, but instead a review of the policy justifications given by the judges in developing the various aspects of the law. This brief review is significant because it reveals that there appears to be no compelling justification given by judges in formulating the law in its broad, all-pervasive form. But the analysis does show a number of concerns that judges had in deciding particular cases that must be addressed in formulating policy in this area.

Parts IV and V review developments in the United States and England. This review highlights some of the problems in this area, and suggests alternative ways of dealing with them.

Parts VI and VII deal with the arguments for and against allowing charities to engage in political activities. These arguments are in sumary form in the outline.

Finally, Part VIII suggests the alternative forms that guidelines relating to the political activities of charities might take.

PART I BACKGROUND: RECENT EVENTS

This issue has been in the news on at least two occasions over the last half-dozen years. It does not appear to have been raised as a serious matter of concern on occasions prior to that. It was not dealt with in the Carter Report, nor was it a matter of concern eight years ago when the Department of Finance issued a Green Paper on charities.

It all began in February 1978, when Revenue Canada, at the specific request of the then Revenue Minister, the Honorable Monique Bégin, published a draft Information Circular setting out what it considered to be the present law in relation to political activities of charities.[5] The Information Circular provided that "An object normally is said to be 'political' if its ultimate intention is to influence the policy making process ... of any level of government."[6] And "An activity is considered political if it is designed to embarrass or otherwise induce a government to take a stand, change a policy, or enact legislation for a purpose particular to the organization carrying on the activity."[7] The circular then went on to distinguish between nonpolitical and political activities. The following activities were defined as nonpolitical:

- Presenting briefs, with recommendations, to appropriate government bodies, whether or not they were solicited, provided they were not part of a campaign to influence legislation.
- Making representations to appropriate elected representatives or government officials.
- Publishing an impartial and objective magazine.
- Holding conferences in which all sides of a public question are presented.

The following activities were defined as political, and thus prohibited:

- Lobbying, whether conducted directly or indirectly.
- Public demonstrations which are intended to apply pressure upon a government.
- Writing form letters to solicit members of the public to write letters of protest to their elected representatives.
- Supporting a political party.

- Writing letters to editors of newspapers which air political views or attempt to sway public opinion on a "political" issue.

Finally, the information circular noted that for activities to be regarded as educational instead of political, the following elements should be present in the activity:

(a) The objective must be to instruct through stimulation of the mind rather than merely to provide information;

(b) The subject matter must be beneficial to the public;

(c) The benefits must be available to a sufficiently large segment of the population;

(d) The interests of individuals must not be promoted;

(e) The theories and principles advanced must not be pernicious nor subversive;

(f) The principles of one particular political party must not be promoted; and

(g) An unbiased and impartial view of all factors of a political situation must be presented.[8]

The publication of the circular provoked a cry of outrage from members of the opposition in the House of Commons, newspaper editors, and charities, in particular, a number of the large churches. Before examining some of the concerns expressed, the events leading up to the issuance of the circular will be briefly reviewed. In early 1976 a church organization, Christian Prisoners Release International, had planned a march on the Russian Embassy in Ottawa. Upon reapplying for registered charitable status (its registration was withdrawn because it failed to file a required report), it was informed by Revenue Canada that if it took part in the march it would be engaging in political activity and therefore could not be registered as a charity under the Income Tax Act. The matter was raised in the House of Commons on several occasions.[9] The government was questioned about whether the Department of External Affairs had placed pressure on Revenue Canada in relation to the matter, and whether the department had written statements clarifying what is considered legitimate activities of charitable organizations and what is regarded as political. This incident undoubtedly called the need for a clear statement of the present law to the attention of Revenue Canada. The information circular was not drafted, however, until the summer of 1977. It was drafted by the officials of Revenue Canada at the request of the then Minister of Revenue, The Honorable Monique Bégin. In the House of Commons she explained that she requested it to be drafted largely because of requests by women's associations who when they were applying for charitable status wished guidance on the question of what constituted prohibited political activities.[10]

The information circular was published in February, 1978, but the issue was not raised in the House of Commons until May 1, 1978. On that date the government was questioned extensively about the information circular. It was accused of attempting to intimidate charitable organizations by its policy, as stated in the document, of prohibiting charities from engaging in political activities. The tenor of the questions might be gained from the following:

> In view of the fact that one church body, the Mennonite Central Committee, has already responded by having interviews with officers of National Revenue, trying to define what the government is getting at in this regard, and that the government, according to officers of National Revenue, have agreed that the Mennonite Central Committee can raise questions in respect of capital punishment, the purchase of fighter aircraft or a change in milk policy but cannot get involved in one of the church coalitions having to do with the upcoming disarmament assembly at the United Nations, will the Prime Minister indicate whether this action of intimidation in the circulation of last February is a direct attempt to remove the legitimate political rights of thousands of voluntary organizations in this country?[11]

The government responded by noting that the circular was not government policy, but was merely an attempt to state what the common law was, for the guidance of charities.[12] Once it was understood that the Information Circular stated the law and not just shifting government policy, many of the comments in the House of Commons relating to the Information Circular became critical of the policy underlying the law:

> How can these charitable organizations, most of which are attempting to ameliorate the plight of certain underprivileged groups of people, be made to flourish when all of the avenues of affecting change are being closed to them? If they are not allowed to lobby, to hold public demonstrations or to conduct letter-writing campaigns to elected representatives, how can they make the government aware of their concerns? How can they get their point across if effective methods of doing so are considered to be what this government terms political and, as it says, "a threat to their status as charitable organizations"? We are not talking about partisan political efforts here at all. What the government says in its circular is that it sees any involvement in the political process, even that of recommending legislation on an issue of national concern, as a questionable and perhaps even subversive activity by these groups.[13]

Senator Guay was the Minister of National Revenue at the time the circular was issued and the matter arose in Parliament. Two days after the matter arose in the House of Commons, in the Senate both Senators Godfrey and Forsey not only criticized Senator Guay for the policy behind the circular but also criticized the language used in the circular.[14] The next day, May 4, Senator Guay gave a detailed reply to his critics, and then announced that he was withdrawing the circular "so that it may be reviewed and reworded to avoid any ambiguity."[15] On May 17, before the House of Commons Standing Committee on Finance, Trade and Economic Affairs, Senator Guay further noted that in revising the circular "I hope to hear the views of some charitable organizations to make sure that our message, when next it goes to them, will not cause the unfortunate reaction that we have been experiencing."[16]

Although the circular was withdrawn the matter continued to arise during question period in the House of Commons. Opposition members were concerned, in particular, about what rules would be applied now that the circular had been withdrawn. Government members explained that since the circular was merely Revenue Canada's interpretation as determined by the courts its publication or withdrawal had no effect on the law.[17]

It might be noted that there was considerable misunderstanding in the press, by voluntary organizations and in the House of Commons about the status of the information circular issued by Revenue Canada. Many commentators were offended that bureaucrats in Revenue Canada should be promulgating rules relating to the political activities of charities, others felt that the circular represented a change in government policy. In fact, of course, Revenue Canada was simply attempting to provide charitable organizations with their interpretation of law as decided by the courts. They have no authority to make laws. In information circulars they simply attempt to deduce the current law from common law cases. Naturally to provide the kind of guidance that the voluntary organizations wanted they had to be more specific than the cases had, and it might be that if challenged on some of their specific interpretations, and in the light of the facts of a particular case, their interpretation might not be upheld by a court. However, it is clear that they were responding to a request for guidance as to what they thought represented the law, and neither they nor the government were attempting to impose new restrictions on charities.

The matter surfaced again in the House of Commons during the debate on the proposed Canada Non-Profit Corporations Act in December of 1978. Numerous criticisms were made of the "withdrawn" information circular. The following are typical:

> First, it was based on a couple of court cases that were certainly not recent and which showed very little relevance to the present

> situation. The interpretation that was put on these cases went, from my point of view, away beyond what those particular cases in effect decided. I thought it entered very much into the situation of departmental officials, if not ministers, beginning to intimidate or to some degree limit the freedom of action of charitable organizations of this country.[18]
>
> I find that sort of circular issued to organizations which are fulfilling a very important role in our society an abomination. They are fulfilling a role that no government in any democratic country will ever be able to fulfill or should fulfill. These channels should be open to our citizens to express themselves, and to influence legislation and legislators.[19]

The newspapers gave extensive coverage to the issue when it arose in the spring of 1978.[20] That coverage will be briefly reviewed here because it reveals the concerns shared by the voluntary sector over the prohibition of political activities.

Many organizations registered as charities explained that they breached the guidelines routinely. For example, on April 16, in a widely reported Canadian Press story the following conversations were reported:[21]

> And A.C. Forrest, editor of the United Church Observer, revealed his magazine and many church leaders continually breach Revenue Canada's strict guidelines for "charitable activities."
>
> Forrest said demonstrations by church members against the Viet Nam war and in support of California agricultural workers would have violated the Revenue Canada guidelines, but were never enforced because they are "foolish" and "unenforcable."
>
> Ms. Dudley of the Migraine Foundation explained that she has never hesitated to encourage the public to write letters to politicians, urging legislation reform.
>
> "I'd be willing to make a guess that 50 per cent of the legislation passed in this country has been at the urging of some group," she said. "If you ever just sat and waited for the government to propose legislation, you know what would happen."

A common theme in the newspaper coverage was to note the apparently arbitrary enforced standards by comparing organizations that had qualified as registered charities, with those that had not:[22]

> Wednesday's column identified two Quebec-based unity groups which had received charitable organization status by Revenue Canada while other non-profit organizations were being denied a similar registration because of political activity.
>
> These two organizations, Positive Action and the Council which had received the Revenue department's blessing, were contrasted with the case of the Brampton Women's Centre which was recently denied a similar status on the grounds that its purposes were partly political.

The author went on to note a number of other unity groups which had received registration.

Both the Toronto Star and Globe and Mail attached the circular in editorials. The Toronto Star in an editorial entitled "Ottawa shouldn't muzzle charities," urged:

> The Trudeau government is off base in its effort to muzzle voluntary organizations that campaign for a better deal for the physically handicapped, native peoples, needy citizens and other groups.
>
> An amendment to the Income Tax Act, clearly defining a charity and its activities in terms of what it does today - and that certainly goes beyond distributing food baskets to the poor and includes advocating change in public policy - is in order.
>
> Meanwhile, let's put those new guidelines where they belong - in the paper shredder.

A few days in another editorial the editorial board of the Toronto Star returned to the point, noting:[24]

> Governments rarely introduce social reforms unless there's public pressure. And charities usually get public support through public meetings, writing to politicians of all parties, appearing on broadcast talk shows, running advertisements and the like.
>
> Yet Guay has now told the citizen-supported voluntary agencies in the community, on whom

> we still depend for many of our social services from day care to homes for the physically and mentally handicapped to free blood transfusions, that they can no longer do these things.
>
> The right to urge governments to change policies, by all the means available in a civilized society, is a fundamental one in a democracy and should not be denied to citizens whether acting as individuals or in association.

After the government announced that the circular would be reviewed, the Globe and Mail in an editorial entitled "Stupid, to put it charitably" stated,[25]

> An official in the charitable and non-profit organizations section says this review will relate only to the document's wording and not to its principles.
>
> This won't nearly do. Both the circular itself and the philosophy it represents should be withdrawn from circulation.

In 1981, the issue again became prominent because two charities decided to dispute Revenue Canada's registration decision involving the alleged political activities of the two charities in the Federal Court of Appeal. One case involved Renaissance International, an Ontario based evangelical organization. Revenue Canada gave this charitable organization notice on November 23, 1980 that it intended to deregister it. Apparently, Revenue Canada was of the view that the organization had engaged in political activities since, among other things, it had purchased two full-page advertisements in a local newspaper urging voters to elect a "moral majority" in the federal election and to express their concern about pro-homosexual candidates in the Toronto civic race. Renaissance groups across the country, all self-described right-wing fundamentalist groups, frequently prepare and publicize moral report cards on candidates in elections.[26]

This case was argued before the Federal Court of Appeal on November 16 and 17, 1982. However, the issue of whether Renaissance International had engaged in political activities was not argued. The court allowed the appeal on the grounds that Revenue Canada had violated the principles of natural justice because of the procedure it followed in sending a letter warning Renaissance International that its charitable status would be revoked. Procedural fairness required that Revenue Canada hold a hearing with Renaissance International before such a letter could be sent.[27]

The second case arose because in February 1980, Revenue Canada refused to register the Manitoba Foundation for Canadian Studies as a charity under the Income Tax Act. The main object of

the foundation was to publish Canadian Dimension, a left-of-centre economic magazine. In her letter to the foundation, explaining her decision not to register the foundation, a representative of Revenue Canada wrote "On the basis of the material contained in the Canadian Dimension magazine, it would appear that its main goal is not to educate the reader in the sense of training the mind in matters of political science but to promote a particular political ideology. Accordingly, the purpose of the magazine does not come within the meaning of education in the charitable sense." There were allegations reported in the press that the magazine had been singled out for political censorship.[29] The foundation filed an appeal from this decision in the Federal Court of Appeal. However, as yet the foundation has not proceeded further with the case.[30]

An association of national charities hired legal counsel and were prepared to petition to intervene in one or both of these cases.[31] Once again newspaper editorials called for a change in the law. For example, The Toronto Star editorialized:[32]

> The law should be amended to recognize the 20th-century role of a charity so that it can collect contributions from individual Canadians without constantly having to worry whether the tax man is going to revoke its status and disallow deductions for the donations.
>
> It is, of course, necessary to draw a line between political and charitable activities. But the line should be drawn at partisan political activities, designed to further the interests of a particular political party or individual, while leaving the churches and voluntary organizations free to attempt to change and influence public policy for the public good.

However, the outcry in the press and the House of Commons occasioned by these two cases was not as great or as strident as the outcry in 1978 over the issuance of Revenue Canada's information circular. Perhaps, when confronted with actual cases commentators became more aware of the sense of some limitation on the political activities of charities.

PART II HISTORICAL DEVELOPMENT AND ASPECTS OF THE PRESENT LAW

In assessing a common law doctrine, a study of its development is significant for two reasons. First, it reveals the social or economic context out of which the doctrine arose so that a judgment can be made as to whether this context still persists. Second, it reveals whether the doctrine was the result of a well-thought out and deliberate policy choice or whether it was the result of a conceptual error, or the extent to which it reflects biases of individual judges or the judiciary generally. One of the remarkable aspects of the common law rule that prohibits charities from engaging in political activities is its fragile doctrinal base, and the lack of any persuasive policy justification given for it by the judges.

The first English case in which it is stated as a general proposition that trusts established with political objectives are not charitable is Bowman v. Secular Society Ltd.,[33] 1917. In that case Lord Parker stated that "Equity has always refused to recognize (political) objects as charitable ... a trust for the attainment of political objects has always been held invalid."[34] This blanket prohibition on political activities and the fact that it has always been the law has been affirmed in subsequent cases in both Canada and England.[35] Some judges have expressed puzzlement at the lack of judicial authority on the point,[36] but none have questioned its correctness.

However, in fact, not only was there no judicial authority for Lord Parker's assertion in Bowman, in 1917, but previous common law cases had held just the opposite. The only related lines of judicial decisions were one that dealt with superstitious uses and one that dealt with charitable purposes that were against public policy. The former had been completely overruled by statute by 1850, the latter was confined narrowly to a small number of cases. During the 1500 and 1600's a number of uses, namely, superstitious uses, were held both by statute and common law not to be charitable.[37] A superstitious use was defined generally as "one which has for its object the propagation of the rites of religion not to be tolerated by the law."[38] Tudor, the leading commentator on charities in the late 1900s, states in an early edition of his treatise on charities, that "The persons who, differing from the established religion, were obvious to the law against superstitious uses, may be divided into three classes: Protestant Dissenters, Roman Catholics, and Jews."[39] He then discusses at length the numerous cases that had arisen under each of these heads. Gradually, as religious tolerance became more widespread, these so-called superstitious uses were rendered valid by statute. The last such statute validating uses relating to the Jewish religion was passed in 1846. Thus, after this year all so-called superstitious uses could be held to be charitable, usually on the grounds of the advancement of religion.

A second line of cases in the 1800s, and which might have been related to the cases on superstitious purposes, held that

certain purposes which were apparently charitable were void on the grounds that they were contrary to public policy. Two of these cases will be briefly reviewed here since they were later referred to as establishing the general proposition that political purposes could not be charitable.

In a case decided in 1828, De Themmines v. De Bonneval[40] the settlor established a trust for the purpose of promoting and publishing a book which taught that the Pope had in all ecclesiastical matters a supremacy which was paramount even to the authority of the temporal sovereign. The Master of the Rolls, Sir John Leach, held, without elaboration, "It is against the policy of the country to encourage, by the establishment of a charity, the publication of any work which asserts the absolute supremacy of the pope in ecclesiastical matters of the sovereignty of the state ... this charitable trust is to be deemed a superstitious use and against public policy."[41] It is questionable whether this case even establishes a separate basis in public policy for holding a trust not charitable; it appears to be based, in the main, on the fact that the trust could be characterized as at least related to a superstitious use.[42]

The second case that was subsequently relied upon as establishing the general proposition that political purposes were not charitable was decided in 1851, Habershon v. Vardon.[43] The testator directed that £1000 of his estate should be paid "towards the political restoration of the Jews to Jerusalem and to their own land." The Vice-Chancellor (Knight-Bruce) gave a short judgment, which can be quoted in full, holding the gift void:

> The gift of the £1000 was not a charity legacy, but was void. If it could be understood to mean anything, it was to create a revolution in a friendly country. Jews might at present reside in Jerusalem; and, if the acquisition of political power by them was intended, the promotion of such an object would not be consistent with our amicable relations with the Sublime Porte.[44]

The public policy basis for this judgment, namely concern over the effect of the gift on the conduct of English foreign affairs, might be legitimate, but it could hardly extend to prohibit all political activities by charities.

In addition to other cases adjudicated during the 1900s holding trusts for political purposes not to be charitable, there were many cases where purposes were held to be charitable, but today would likely be held to be for political purposes and therefore invalid. For example, the following purposes were held to be charitable: to distribute the works of Joanna Southcote;[45] to attempt to promote legislation prohibiting the sale of intoxicating liquor;[46] to propagandize anti-vivisection principles;[46] establish a fund for promoting a Bill before Parliament to establish a bishopric for Birmingham;[48] to spread

socialistic doctrines, subject to their being found on inquiry not to be illegal;[49] to establish a club for the furtherance of conservative principles combined with religious and mental improvement;[50] "to promote, aid, and protect citizens of the United States, of African descent, in the enjoyment of their civil rights."[51]

No 18th century commentator or textbook writer (except one, who is mentioned below) suggested that generally political purposes could not be regarded as charitable. For example, in 1906 the editors of the leading treatise on charities, Tudor's Charitable Trusts, assert that "Gifts for propagating particular doctrines may also be charitable ... In these cases, provided that the doctrines to be promulgated are not of a pernicious character, the court looks only to see whether the intention is to benefit the community. It is not concerned to see whether that result will be achieved or to determine the merits of any particular controversy."[52] The only related basis for holding a purpose not charitable that was recognized by the commentators was the basis that the purpose was against public policy. Invariably, the two cases cited as illustrating this general ground were the two discussed above: De Themmines v. De Bonneval, a trust to print and circulate a treatise inculcating the supremacy of the Pope,[53] and Haberston v. Vardon, a gift toward the political restoration of the Jews.[54] But no commentator generalized this grounds for holding a purpose not charitable into a general prohibition against political purposes,[55] except one.

In 1888, Amherst D. Tyssen, an English barrister, published a treatise entitled The Law of Charitable Bequests.[56] In his treatise he made the following bold generalization about the validity of gifts for political purposes, "an association (to promote some change in the law) is not really of a charitable nature."[57] He based this conclusion largely on the two cases cited above, but in addition he supported it with the following reason, "However desirable the change may really be, the law could not stultify itself by holding that it was for the public benefit that the law itself should be changed."[58]

This assertion was to be the genesis of the common law rule that charities cannot engage in political activities. Before examining its evolution and incorporation into the common law, however, it might be noted that it would have been sounder for the author to argue to exactly the opposite conclusion than he reached on the basis of his reasoning: suggesting that the law should not recognize the legitimacy of those who argue that it should be changed is likely to lead to its stultification. As one commentator has noted, "There would be no stultification in the law if the law were that the object of improving the law was charitable."[59] The authors of the second edition of Tyssen's treatise must also have been embarrassed over the breadth of this generalization and the reason given for its support since the passage was deleted from that edition, over 30 years later.[60]

Only four years after his treatise was published, Tyssen's view on the validity of a trust for political purposes was soundly rejected by a Canadian court in Farewell v. Farewell.[61] The case

involved a bequest to trustees "to promote the adoption by the parliament ... of legislation prohibiting totally the manufacture or sale in the Dominion of intoxicating liquor ... whether by educating and developing a strong public sentiment in its favor or by other and more direct means ..."[62] In holding this purpose charitable Boyd, C. dealt directly with Tyssen's assertion about the invalidity of political purposes. Regarding the "stultification" argument he said:

> But the judges frequently say that the law is not right as it stands - they suggest amendments of the law, and though they are undoubtedly bound to administer the law as they find it, they are not on that account to assist the bequests of one who seeks to procure what he deems a desirable change in the law by constitutional means.[63]
>
> Again the question is not as I take it whether the law should stultify itself by declaring that it was for the public benefit that the law should be changed. The court in affirming the validity of a charitable bequest does not so declare because satisfied that it is or that it will be a public benefit - The question is first: Is it for a public purpose? then: Is that purpose a lawful one?[64]

Finally, as to whether the gift was lawful Boyd, C. noted:

> Does this object become other than "charitable" because the testator indicates that the mode of obtaining what he aims at is by means of legislation?
>
> Surely no; because the result desired is to be pursued by the education of public opinion; that vis a tergo by which the organism of government is moved - statutes are shaped - penalties enforced.
>
> This is to seek the amendment of the law, according to law, and therefore the proposed scheme is not contrary to law.[65]

Similar sentiments were expressed by an English court seven years after the publication of Tyssen's text, although the text was not specifically referred to. In re Foveaux,[67] involved a gift to various societies for the suppression and abolition of vivisection. Even though the repeal of an Act of Parliament was part of the objects of these societies,[68] the gift was held to be charitable. In an implicit reference to Tyssen's argument the judge noted, "The intention is to benefit the community; whether, if they achieved their object, the community would, in fact, be benefitted is a question on which I think the court is not required to express an opinion."[69]

It seems clear that political objects alone were not sufficient to render a charitable trust void in the 1900s. The first case in which there is an explicit statement that a trust for the attainment of political objects is not charitable was decided in 1917, Bowman v. Secular Society Ltd.[69] This is the case that all subsequent cases holding political objects not to be charitable rely upon. However, it is slim authority. Only one judge out of five who gave reasons for judgment really addressed the issue, and the only authority he cited for the proposition was De Themmines v. De Bonneval.[70] But because it is such a significant case it is worth reviewing in some detail, along with the reason given by Lord Parker, the only judge to address the issue, as to why political purposes could not be charitable.

In Bowman, Bowman's next-of-kin disputed a bequest be made to the Secular Society Limited. The main objects of the society were to promote the principle that human conduct should be based upon natural knowledge, and not upon supernatural belief; the abolition of all support, patronage or favor by the state of any particular form or forms of religion; and numerous other secularizing goals, many involving legislative changes. The main issue in the case was whether a company incorporated under th Companies Acts with these objects was capable of taking a gift. The next-of-kin argued it was not on the ground that (1) the propagation of anti-Christian doctrine was blasphemy (and therefore illegal), and (2) in any event, the courts should not assist in the promotion of such anti-Christian doctrine was blasphemy (and therefore illegal), and (2) in any event, the courts should not assist in the promotion of such anti-Christian objects. The court settled the case by holding that such a corporation was capable of acquiring property by gift; however, four of the judges also addressed the situation had there been a trust. They all arrived at different conclusions. Lord Parker was the only judge to raise the issue of the validity of political purposes. And, after very emphatically stating that no trust had been vested, he goes on to conclude that if there had been it would be invalid. He asserts, without authority (and clearly wrongly), "Equity has always refused to recognize (political) objects as charitable ... a trust for the attainment of political objects has always been held invalid."[71] He reasoned that this is the law not because such a purpose is illegal, but "because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift."[72]

Textwriters[73] and commentators[74] writing immediately after the judgment tended to treat Lord Parker's remarks about the validity of political objects as anomalous. However, during the 1920s and '30s a number of cases held or suggested that political purposes were not charitable.[75] Finally, in 1948, in what has become the leading case, National Anti-Vivisection v. Inland Revenue Commission,[76] the English House of Lords, many of the judges citing Lord Parker in Bowman and from Tyssen's first edition, held that political purposes were not charitable. This case has been followed in a number of subsequent English cases and there can be no question now about the validity of the general proposition.[77]

In Canada, around the turn of the century a number of political purposes were held to be charitable; for example, a testamentary trust to promote temperance legislation,[78] a trust "to promote, aid and protect citizens of the United States, of African descent, in the enjoyment of their civil rights,"[79] and a gift to the British Union for the Abolition of Vivisection.[80] Bowman,[81] the first English case to suggest that political objects were not charitable, was not cited in a Canadian case for that proposition until 1937. In that year in Re Knight,[82] in dicta it was stated that a gift "to the Henry George Foundation, an organization formed and established for the promotion of the doctrines of the late Henry George, including his theories and principles respecting the Single Tax" was "political rather than charitable."

After National Anti-Vivisection Society v. I.R.C.[83] was decided by the House of Lords, two leading Canadian cases, both in the Saskatchewan Court of Appeal, have followed it and held that political purposes are not charitable.[84] In Re Patriotic Acre fund,[85] it was stated that "Even if it is assumed that some of the activities of the United Farmers are charitable, its main activities ... are political." Similarly, the Co-operative College of Canada was held not to be a charitable organization, in part, because some of its objects were political.[86]

Before reviewing the policy reasons given by the court for prohibiting political activities two general aspects of the present law should be clarified. First, the general proposition that organizations constituted for political purposes cannot be characterized as charitable applies whether the organization's objects expressly refer to political purposes or political purposes are implicit in the organization's objects. Thus, in McGovern v. Attorney General[87] Slade J. refused to grant an application by the trustees of the Amnesty International Trust for a declaration that the trust should be registered under the Charities Act 1960. One object of the trust was "attempting to secure the release of Prisoners of Conscience."[88] It was held that this purpose implied that the object of the trust were to be furthered by procuring "the reversal of the relevant decisions of governments and governmental authorities ... The procurement of the reversal of such decisions cannot, I think, be regarded merely as one possible method of giving effect to the purposes (stated) ... "[89] Similarly, in Annual Defence and Anti-Vivisection Society v. I.R.C.,[90] the objects of the Society were stated to be to "oppose vivisection and all experiments on animals 'calculated to cause pain'."[91] Mr. Justice Dankwerts rejected the Society's claim that this was a charitable purpose since it did not refer to attempting to influence legislation: "The matters which are to be done ... must necessarily in the end involve an attack on the Cruelty to Animals Act, 1876, and the promotion or the support of legislation for repealing that Act and for suppressing vivisection altogether."[92]

A second general aspect of the present law is that at common law an organization whose main objects are charitable may take part in influencing legislation if these activities are incidental

and ancillary to its primary charitable objects. This was first made clear in the reason for judgment of Atkin L.J. in CIR v. Yorkshire Agriculture Society,[93] decided in 1928. The Yorkshire Agriculture Society was formed in 1837 for the promotion of agriculture (a charitable purpose). In 1923 it amended its rules and adopted as one of its objects "(t)he watching and advising on legislation affecting the agricultural industry and the improvement, assistance and promotion of agriculture generally." Lord Justice Atkin did not regard the reference to legislation as a serious threat to the society's charitable status:

> I can imagine that a society which was formed solely for the purpose of watching and advising on legislation affecting agriculture would not be a society formed for a charitable purpose. But that does not seem to me at all to affect the matter. It is perfectly consistent with the main object of the Society being one for the promotion of agriculture generally, that in order to carry out its object it should watch and advise on legislation affecting agriculture.[94]

This general proposition has been repeated in a number of subsequent English cases. For example, Lord Simonds suggested in National Anti-vivisection[95] that where the political objects are "merely ancillary to the attainment of what is exhypothesi a good charitable object," the trust would stand.[96] In Re Hood[97] on an application for a determination of the validity of a testamentary disposition on trust "in spreading the Christian principles before mentioned and in aiding all active steps to minimize and extinguish the drink traffic,"[98] Lawrence L.J. held that:

> The learned juged was right in holding that it was not an independent additional object, but was merely introduced by the testator as pointing out one of the ways by which his main object could be attained ... That main purpose being charitable, it seems to me that it is none the less good because the testator has pointed out the means by which in his opinion that main object could best be obtained (emphasis added).[99]

And in McGovern v. Attorney General,[100] which involved the charitable status of Amnesty International, Slade J. said:

> Nevertheless, in any case where it is asserted that a trust is non-charitable on the grounds that it introduces non-charitable as well as charitable purposes, a distinction of critical importance has to be drawn between (a) the designated purposes of the trust, (b) the designated means of carrying out these purposes and (c) the consequences of carrying them out ...

> Similarly, trust purposes of an otherwise charitable nature do not lose it merely because the trustees, by way of furtherance of such purposes, have incidental powers to carry on activities which are not themselves charitable.[101]

In spite of the clarity of the common law position[102] it has been suggested that in Canada, at least in order to be registered under the Income Tax Act, charities are prohibited from engaging in any political activities at all, even if they are only ancillary to their main charitable objects.[103] This view is based on the relevant definitions in the Income Tax Act. To be registered as a "charitable organization" under the Act a charity must devote "all (its) resources ... to charitable activities."[104] To be registered as a "charitable foundation" it must be "constituted and operated exclusively for charitable purposes."[105]

The Department of Revenue, in its information circular, "Registered Charities: Political Objects and Activities,"[106] which was issued and then hastily withdrawn in 1978,[107] construed these definitions literally. It took the position that although a charitable organization with secondary political objects might be registered, it could not engage in any political activities: it has to devote "all (its) resources ... to charitable activities."[108] Whereas a charitable foundation with secondary political objects would not be registered at all since by the definition an applicant must be constituted and "operated exclusively for charitable purposes."[109]

This is not the place to embark on a legal argument about the technical meaning of the words used in the definition of a "charitable organization." However, it might be noted that the view that because a "charitable organization" is required to devote "all (its) resources ... " to charitable activities it cannot engage in ancillary political activities is not an obvious one, whether a purposive or literal approach is taken in construing the definition. There is nothing in the legislative history relating to the definition of "charitable organizations" to suggest that a dramatic change in the common law was intended. In terms of the literal meaning of the definition it is not obvious what the phrase "charitable activities" refers to. It appears to have been used in the definition only because the grammatical context and its relationship to other subsections required it. However, it is not a phrase that was used at common law. At common law the issue always is whether purposes or objects are charitable. Clearly objects or purposes can be charitable, but how can "activities" themselves be charitable. If charitable activities are construed as activities engaged in pursuit of charitable purposes then we are driven back to the common law definitions. At common law political purposes were held not to be charitable, but in pursuing its charitable purposes, as a matter of policy, a charity could engage in some limited amount of political activities. Nothing in the common law doctrine would hold that political activities could not be charitable activities (assuming that charitable activities

are defined as activities engaged in pursuit of charitable objects). Thus, at common law it would not be incorrect to suggest that charities must engage exclusively in charitable activities and yet admit that some portion of these activities could be of a political nature. At least it might be fairly said that the question as to whether "charitable organizations" can engage in an ancillary amount of political activities is an open question in Canada.

PART III POLICY JUSTIFICATION GIVEN BY JUDGES FOR PRESENT LAW

No general principle of common law dictates that charities should not be allowed to engage in political activities. Judges reached that result solely on policy grounds. In this section of the paper the various reasons judges have given for prohibiting charities from engaging in political activities will be reviewed. Any proposed changes in the law obviously ought to address the concerns raised by the courts.

It is commonly stated in broad terms simply that "Trusts for the attainment of political objects have always been held not to be valid charitable trusts ... "[110] However, at least in terms of examining the reasons for the rule, it is useful to further classify the cases. Analytically, the courts embrace within the prohibition on political activities at least four distinct kinds of activities: (1) attempting to bring about, or opposing, changes in the law; (2) furthering the aims of political parties; (3) effecting foreign relations; and (4) propagandizing, including the spread of general political doctrine or attempts to persuade the public to adopt a particular attitude toward some broad social question.[111]

A Promoting or Opposing Changes in the Law

A trust or other organization whose principal purposes include promoting changes in the law will not be charitable, even though its aims otherwise fall within a recognized category of charity. The leading authority for this proposition is National Anti-vivisection Society v. I.R.C.[112] The society claimed an exemption from income tax on the ground that they were a charitable organization. The main object of the society was the total abolition of vivisection by repeal of the Cruelty to Animals Act, 1876 and the substitution of new legislation. A majority in the House of Lords held that the trust was not charitable on two grounds. First, it could not be shown that the trust was for the benefit on the community within the fourth head of trusts laid down by Lord Macnaughten in Pemsel's case. Second, the objects of the society being an alteration in the law, the purpose was a 'political' one and therefore not charitable. There are numerous cases in which an organization's purposes have been held to be political, and therefore not charitable, because they embrace the promotion of changes in the law.[113] In holding this purpose to be political the courts have not distinguished between attempts to change legislation through grassroots or direct lobby. The following reasons have been given by the courts for prohibiting charities from promoting or opposing changes in the law.

The rationale given by Tyssen, the first commentator to suggest the general principle that a trust established to secure a change in the law is political in character and therefore not charitable, was that "the law could not stultify itself by holding that it was the public benefit that the law itself should be changed. Each court in deciding on the validity of a gift must

decide on the principle that the law is right as it stands."[114] This quotation has been cited by the courts with approval.[115] But, it is difficult to ascribe sense to the rationale. On the face of it, it would seem that the rationale would support just the opposite conclusion. The law could best assure that it was not stultified by encouraging proposals for reform. A leading English scholar on the law of equity made the following comment about the rationale given by Tyssen, "surely this is carrying the fiction of the perfection of the law, if indeed such a fiction exists, to a dangerous extreme ... "[116] But even this comment goes too far, by holding that a trust whose purpose is to achieve a change in the law is charitable, a judge is not necessarily conceeding the law is less than perfect. Only that it is for the public benefit that people be allowed to challenge the law, or argue that it should be changed.

Most frequently, the courts have simply noted that political activities are not charitable because the courts have no way of knowing whether the change in the law would be for the public benefit. Lord Parker in Bowman v. Secular Society[117] elaborated on this rationale for prohibiting charities from engaging in political activities:

> A trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.[118]

This rationale, which is obviously based on the views of Tyssen that were quoted above,[119] has been given in numerous cases.[120] Indeed the quotation from Lord Parker is often simply quoted verbatim.[121]

A number of criticisms have and can be made of this rationale. First, in holding a particular religious doctrine to be charitable the courts do not concern themselves with whether it is for the public benefit. They admit they have no way of judging; therefore, all religious purposes are held to be charitable unless against public policy. The same reasoning could be applied to political purposes.[122] Indeed, in the United States, the same impossibility that troubled English courts (determining whether proposed legislative changes were in the public interest) led many American courts to the conclusion that all trusts for political purposes are charitable.[123]

Also, the first premise of the argument - that judges have no way of knowing whether a change in the law would be in the public benefit - is open to dispute. Judges frequently recommend changes of the law. And indeed, somewhat ironically, in the

leading case in which the court held that political purposes were not charitable, National Anti-Vivisection Society v. I.R.C.,[124] an alternative ground for the judges decision was that the suppression of vivisection, which was the purpose of the trust in the case, was not for the public benefit. One commentator characterized this rationale given by judges as "true pathos." It is also a strain on credulity, noted that "There are few people better qualified than judges to assess whether a change in the law would be for the public benefit."[125]

Of course the charitable nature of a purpose should not turn on whether a particular judge thinks a change in the law would or would not be in the public interest. So most significantly, this rationale for prohibition perhaps simply misses the point. The question is not whether a particular legislative outcome is in itself for the public good, but whether having all sides presented on legislative issues is a public benefit. As a legal commentator has noted, "There seems no reason why judges should be unable to determine whether the advocacy of change in particular laws is for the public benefit. It may be possible to decide it is, even if there remain doubts about the rights and wrongs of the change itself. In a free democracy the promotion of controversial views may well be for the public benefit."[126] The leading American commentator, in supporting the United States law also revealed the fallacy of this rationale for prohibiting charities from engaging in political activities:

> Many American decisions and, it is submitted, the better reasoned cases, declare that trusts which seek to bring about better government by changing laws or constitutional provisions are charitable, so long as the settlor directed that the reforms should be accomplished peaceably, by the established constitutional means, and not by war, riot, or revolution. If the plans advocated have merit, and can win their way through arguments advanced by means of the trust, will it not be for the best interests of society that the changes be made? If the new schemes are impractical ideas, they will not be widely accepted and the trust will have served no purpose except to stimulate public interesting the soundness of existing methods of government, which is in itself desirable. A refusal to give judicial support to a gift which is aimed at changes in statutes or constitutions discourages progress. Assuming that democracy is a success and that the people are able to judge what institutions are best for themselves, the more discussions of new governmental ideas the better. Progress comes from trial and error, from argument and thoughtful consideration, not from stolid adherence to a plan which was good enough for our ancestors who lived under different conditions.[127]

A third reason sometimes given by the courts in support of their conclusion that political activities are not charitable is that it would be incongrous if the Attorney-General and the court were called up to administer a trust, which they might be required to if it were charitable, when they did not agree that the legal changes being proposed were in the public interest. Lord Simonds, in National Anti-Vivisection, said:

> One of the tests, and a crucial test, whether a trust is charitable, lies in the competence of the court to control and reform it ... it is the King as parens patriae who is the guardian of charity and ... it is the right and duty of the Attorney-General to intervene and inform the court, if the trustees of a charitable trust fall short of their duty. So too, it is his duty to assist the court, if need be, in the formulation of a scheme for the execution of a charitable trust. But ... is it for a moment to be supposed that it is (his) function ... to intervene and demand that a trust shall be established and administered by the court, the object of which is to alter the law in a manner highly prejudicial, as he and His Majesty's Government might think, to the welfare of the state? (Emphasis added.)[128]

This argument is often stated in slightly different forms. For example, it is stated that it would be an anomaly for a court, which has been entrusted with the duty of maintaining and enforcing the laws as they exist, to administer a trust devoted to changing those laws.[129] Or that, even if evidence were introduced showing that a particular change in the law were beneficial, the court "must still decide the case on the principle that the law is right as it stands, since to do otherwise would be to usurp the functions of the legislature."[130] This basic argument, and its variants, are without substance. It is not clear why enforcing a charitable trust whose purposes they disagree with should cause either the Attorney-General or judges any difficulty. Presumably, these people must frequently make and enforce decisions in their official capacity that they personally disagree with.

A fourth reason given by the courts in support of their conclusion that political activities are not charitable is that changes in the law are often advocated for reasons of self-interest. For example, one important factor considered by the Saskatchewan Court of Appeal regarding both the United Farmers of Canada[130] and the Co-operative College of Canada[131] was that their political objectives were self-serving. However, this rationale suggests the prohibition is redundant. That charities cannot be established by a donor for purposes that are self-serving is a principle underlying the definition of charity generally. The fact that some organizations may be denied charitable status because their

members have a special interest or stake in the outcome of some governmental action would not appear to be a justification for denying all charitable organizations the right to engage in political activities. Allowing charities to engage in political activities without limitation, however, would require difficult line-drawing to exclude self-interested groups. Indeed, the difficulty of preventing charities from simply pursuing the self-interest of their members might be one reason to limit the amount of political activity in which charities could engage.[133]

A fourth reason that courts sometimes give in holding that charitable organizations cannot engage in political activities is that such activities are neither educational nor charitable. As well as begging the issue in question - whether legislative activity should be regarded as charitable - this argument confuses the goals of charitable organizations with the means they employ to achieve those goals. The protection of wildlife, for example, has generally been recognized as a legitimate charitable purpose. The question then becomes, why foreclose political activities as a means of achieving this goal?

Finally, courts have suggested that political purposes are not charitable because they are prompted by campaigning and agitation, giving rise to controversy. This concern is evident in the judgment of Lord Wright in National Anti-Vivisection:

> Its proposed object is of a public and very controversial character. The present capacity of the appellant society is not great but the possibilities of political agitation would be immensely increased if a few millionaires were to endow it with great financial resources.[134]

The fallacy in this argument is the assumption that charity and controversy are inconsistent. Just the opposite is in many instances the case. The following quote from Professor Sacks explains the error well:

> There is a tendency to regard charity as intrinsically free of constroversy because it includes only activities that are 'good' or 'beneficial to the public.' This notion ... represents a fundamental misunderstanding of the institution which not only perverts its historical development, but also destroys its essential values. The most traditional of charitable purposes ordinarily require the acquisition, development and dissemination of information and ideas, and they are not rendered the less charitable because such information or ideas are disputable and disputed ...[135]

B Supporting Political Parties and Promoting Political Doctrine

The courts have held that a trust's purpose is political, and is therefore not charitable, if its purpose is to promote the interests of a particular political party on the principles propounded by a particular political party. No reported case deals with contributors to political parties attempting to deduct their contributions as a charitable donation; presumably the point is too obvious. However, a number of cases have held that a trust or other organization whose principal purposes include promoting the cause of a political party is not charitable.

By way of illustration, In re Jones,[136] a gift "to the Primrose League of the Conservative cause to be used as a habitation in connection with the league or in a manner which will benefit the cause" was invalidated:

> That the league was not a charity was shown by a passage ... of the Primrose League Manual: It is most essential that the political character of the Primrose League should be conspicuously maintained.[137]

Similarly, in Re Hopkinson,[138] Vaisey J. felt compelled to strike down a gift on trust "for the advancement of adult education with particular reference to the following purpose, ... the education of men and women of all classes (on the lines of the Labour Party's memorandum ...) to a higher conception of social, political and economic ideas and values ... ": "the testator's object here was plainly to secure, not necessarily a certain line of legislation, but a certain line ... of political administration and policy." The memorandum in question was to further the ends of socialism and to encourage the solution of contemporary problems by the application of socialist principles.

In Bonar Law Memorial Trust v. I.R.C.[140] a trust to establish a college run by members of the Conservative Party sought to be exempted from income tax. They argued that the curriculum was non-partisan and that the students were admitted without reference to their political leanings. Some lectures were given on the Conservative Party organization and during the holidays the building was used to give courses limited to Conservative members of Parliament. Mr. Justice Finlay held that a trust for the furtherance of a particular political party could not be a valid charitable trust. On the facts, the Bonar Law Memorial Trust was one for the Conservative Party and therefore invalid. Finally, in a Canadian case, a trust "for the purposes of promoting and propagating the doctrines of teaching socialism" was held not to be charitable."[141]

If, of course, it can be demonstrated that the political purposes are subsidiary to some main charitable object, the trust can be upheld on the basis of the general rules discussed above. Thus, in In re Scowcroft,[142] a bequest of a building "known as the

Conservative Club and Village Reading-room ... to be maintained for the furtherance of Conservative principles and religious and mental improvement" was upheld:

> "(T)he furtherance of religious and mental improvement is ... an essential portion of the gift. It is, therefore, a gift in one form or another for religious and mental improvement, no doubt in combination with the advancement of Conservative principles ... "[143]

And in In re the Trusts of the Arthur McDougall Fund,[144] a trust was established by a political society for the advancement of education in political science. The trustees were all members of the Proportional Representation Society. Mr. Justice Upjohn upheld the trust under the head "education." Bonar Law Memorial Trust was distinguished on the basis that in the instant case, on a true construction of the trust deed as a whole, there was nothing to show that "the trusts were intended to further political objects and promote the purposes of the society."[145]

The courts have not been clear about why gifts to political parties or closely related organizations do not qualify as charitable. Perhaps having articulated a general rule that political purposes (formulated in the context of attempts to change specific legislation) are not charitable its application to political parties and furthering political doctrine seemed too obvious to require the elaboration of a different rationale. Therefore, basically the same reasons have been given: the court has no way of determining whether the objects of the trust would be for a public benefit; and it would run the "risk of encroaching on the functions of the legislature and prejudicing its reputation for political impartiality, if it were to promote such objects by enforcing the trusts."[147] Also the prohibition is closely related to the prohibition on the dissemination of propaganda, which is discussed below.

However, in principle, it does seem clear that the same policy reasons for subsidizing the voluntary sector do not apply to the subsidization of political parties. And now that there is a special provision in the Act for contributions to political parties, if charities are to be permitted to engage in political activities, it would be necessary to prohibit them from supporting particular parties or candidates, otherwise the clear policy limitations underlying the political contributions deduction would be undermined.[148]

C Affecting Foreign Relations

Another group of cases in which the courts have invoked the principle that political purposes are not charitable have involved purposes that might affect foreign relations. For example, in Re Strakosch[149] the gift was to trustees "for any purpose which in their opinion is designed to strengthen the bonds of unity between the Union of South Africa and the Mother Country, and which

incidentally will conduce to the appeasement of racial feeling between the Dutch and English speaking sections of the South African community." In another case the purpose of the trust was to promote a closer and more sympathetic understanding between English and Swedish people.[150] Neither of these trusts were held to be charitable.

Most recently, a trust established by Amnesty International whose objects included, "attempting to secure the release of prisoners of conscience" and "procuring the abolition of torture on inhumane or degrading treatment or punishment" was held not to be charitable on these grounds.[151] In reaching this conclusion Slade J. noted that the main object of the organization was to secure the alteration of the laws of a foreign country. He conceded that "the dangers of the court enroaching on the functions of the legislature or of subjecting its political impartiality to question would not be nearly so great as when similar trusts are to be executed in (England)."[152] However, he went on to give two reasons why trusts whose object was to change the laws of foreign countries should be embraced within the general prohibition on charitable trusts of political activities. First, like a proposed change in domestic law, indeed even more so, "the court will have no adequate means of judging whether a proposed change in the law of a foreign country will or will not be for the public benefit."[153] Second, he was concerned about the effects that holding such trusts to be charitable might have on the relations of the U.K. with foreign countries, an effect he said the court should consider on grounds of public policy: "before ascribing charitable status to an English trust of which a main object was to secure the alteration of a foreign law, the court would ... be bound to consider the consequences for this country as a matter of public policy. In a number of such cases there would be a substantial prima facie risk that such a trust, if enforced, could prejudice the relations of this country with the foreign country concerned."[154]

The reasons that the courts give for holding a trust whose purpose involves a change in the law political and therefore charitable were discussed above. The additional concern that the courts have had with trust purposes that involve a change in a foreign law appears to be even less persuasive. The concern expressed by the courts is that enforcement of such a trust might prejudice the relations the enforcing country has with a foreign jurisdiction. The only two possible sources of "prejudice" is that if the trust is charitable the Attorney-General might have to become involved in an action to enforce the trust, and the trust will be provided with a number of fiscal benefits. Does prejudice arise because a foreign power might interpret such action as "support" by the Canadian government, for example, of the purpose being pursued? Clearly this would not be the implication if such trusts qualified as charitable as a matter of law, and it is difficult to imagine that it would be so perceived by a foreign power. It might be noted that in the U.S. such trusts have always been held charitable.

Many of the trusts whose purposes were to promote peace and international understanding have been held noncharitable not only on the grounds that they might affect foreign relations, but also because they have a "propagandist" aspect, which is discussed next.

D Disseminating Propaganda and Attempting to Change Social Attitudes

Purposes that involve attempts to persuade people to adopt particular attitudes have been held not to be charitable on two broad grounds:[155] they are not educational since all sides of an issue are not presented; they are not for the public benefit since they are political (that is to say, the courts have no way of judging whether they are for the benefit of the public).

The cases noted above relating to the support of particular political doctrine, are, in part, illustrations of this principle. In Re Hopkinson Vaisey J., in holding that a fund for the purpose of educating people along the lines of a Labour Party's memorandum was not charitable, stated "Political propaganda masquerading - I do not use the word in any sinister sense - as education is not education within the Statute of Elizabeth ... "[157] In Re Strakosch[158] the English Court of Appeal found "it impossible to construe" a trust for strengthening bonds between South Africa and England and incidentally appeasing racial feeling between South African and England and Afrikaans communities in South Africa" as one confined to educational purposes." Greene Mr. said that "the problem of appeasing racial feelings within the community is a political problem, perhaps primarily political."[159] In an Ontario case, Re Knight,[160] a gift to the Henry George Foundation, whose purpose was to promote an understanding and acceptance of the principles ennunciated by Henry George in Progress and Poverty, was held not charitable.

Propaganda, in this context, as opposed to education, has been defined as presenting only one side of an issue or presenting unsubstantiated opinions. Re Bushnell[161] involved a trust "for the advancement and propagation of the teaching of socialised medicine." Goulding J. concluded that the trust could not be supported as an educational trust. He stated: "The testator never for a moment, as I need his language, desired to educate the public so that they could choose for themselves, starting with neutral information, to support or oppose what he called 'socialised medicine,' I think he was trying to promote his own theory by education, if you will propaganda, but I do not attach any importance to that word."[162]

Later in this paper the policy arguments for and against allowing charities to engage in political activities will be examined. However, it seems fair to conclude this brief review of the justifications for the present law given in the jurisprudence by noting that in dealing with this issue judges have not disclosed any compelling reasons in support of the present law. Indeed, as a demonstration that there was nothing inevitable about the

result reached in the development or the common law, the American courts, following the same common law precedents and principles as the English courts, reached the opposite conclusion. In the great majority of American jurisdictions the fact that a trust has as its essential purpose the promulgation or advocacy of changes in the law or in systems or methods of government will not affect its validity as a charitable trust.[163]

It is puzzling to speculate why the common law courts developed the doctrine when there was no related common law principles that would suggest the result and the policy reasons for doing so do not appear overly compelling. Or put another way, one must wonder how it came to pass that a statement by Lord Parker in Bowman,[164] that was not necessary in reaching the decision in the case and which drew apparently upon the authority of an author whose views on the subject had been consistently rejected by judicial authority, was later adopted as "the law."

Perhaps one explanation lies in the increased significance of the tax consequences of holding a purpose charitable.[165] Prior to the passage of the first taxing statute, the major policy against permitting gifts on trust for charitable purposes was the public policy against tying up the alienability of land for long periods of time - manifested in the rule against perpetuities. The courts evidently determined that the public benefit from charitable activity outweighed the restriction on alienability. As long as all that was at stake was this restriction, the courts could be satisfied upholding the gift as charitable as long as it was not for some illegal or immoral purpose. With increased taxation, but with an exemption for charities, much more was put at stake. Instead of just alienability being effected, the benefits of charitable activity had to be considered against the loss to the Revenue. Under these circumstances, the courts had to consider the types of activity that were appropriately carried out by charities and thus indirectly subsidized by the Revenue. The judgment of Lord Wright in National Anti-Vivisection clearly reflects a sensitivity to this issue: "(the political objects of the society) does prevent them from claiming the benefit of being immune from income tax, which would amount to receiving a subsidy from the state to that extent."[166]

Also, perhaps the shift in the court's holding had something to do with the types of cases that came before them. Most of the law in this area arose out of cases in which organizations were opposing vivisection and supporting prohibition. In the late 1900s the courts held both of these purposes to be charitable. For example, in an Irish case which involved a gift to the Society for the Abolition of Vivisection, whose main object was to "procure by legislative enactment the entire suppression of vivisection, the Vice-Chancellor of Ireland, in upholding the charitable purpose of the trust stated. "It is said that there is something illegal in the nature of the society, which, it is stated, has been instituted for the purpose of interfering with the operation of an Act of Parliament. I cannot yield that argument. The society does not profess to interfere in any way with the Act of

Parliament. It is a society for the purpose of inducing the Legislature by legitimate means, by bringing public option to bear, to make certain alterations in the law, and, instead of regulating the practice of vivisection to procure a law abolishing it altogether. The statute at present allows vivisection to be carried on, under certain restrictions and limitations, for scientific purposes, and the object of the society does not contain in itself any element of illegality."[167] Similar conclusions were reached in England[168] and Canada."[167] However, in the mid-1900s the National Anti-Vivisection Society was held not to be a charitable because of its political objects.[170]

The same trend is seen in the cases involving temperance. In 1982, the Chancellor of Ontario held that a gift on trust to be used "to promote the adoption by ... Parliament ... of legislation prohibiting ... the manufacture and sale ... of intoxicating liquor ... " to be "not only legitimate but praiseworthy."[171] However, in 1926, Rowlett J. held that a similar gift whose purpose was to promote "legislation diminishing the consumption of alcohol" to be non-charitable. He concluded "any purpose of influencing legislation is a political purpose in this connection."[172]

One cannot help but feel that, in part, the change of direction in law reflected prevalent attitudes towards the purposes at issue in these cases. In the 1800s, vivisection, dissecting the body of a living animal for scientific research, was probably regarded by many as cruel butchery. By the mid-1900s it was more widely regarded as a scientific necessity, particularly after Bantings and Best's successful experiments with insulin. The same change in attitude undoubtedly occurred with respect to prohibition. The temperance movement was probably more widely supported in the late 1800s than in the late 1920s.

PART IV DEVELOPMENT IN THE UNITED STATES

In the United States, Congress has attempted to regulate the political activities of charities since 1934. Over the years numerous concerns were expressed about the legislation. Finally in 1976, after a tortuous seven-year history of efforts, both in and out of Congress, to deal comprehensively with the problems and an exhaustive examination of all the issues, detailed guidelines were enacted. Therefore, in considering the various ways that the political activities of charities might be regulated, the American experience will be instructive. Here, then, the history of the American efforts and the present legislation, will be briefly reviewed.

A Historical Development of the U.S. Law

The modern U.S. Internal Revenue Code was passed in 1913. In 1917 a deduction for contributions to charities was enacted. The section did not explicitly restrict the political activities of a charitable organization, but did refer to the necessity for it to have an exclusively religious or charitable purpose. At that time in U.S. trust law, the trend in the jurisprudence was to permit charitable trusts to engage in legislative activities, and there was a strong body of opinion that the Treasury, in determining what activities were charitable for purposes of the income tax, would follow this trend. However, the Treasury followed the English view, and the view of the minority of U.S. jurisdictions, in holding that charities, to qualify to be recipients of tax deductible contributions, could not engage in political activities. In 1919, the Treasury issued a regulation providing that "associations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute."[174]

The question was eventually resolved in 1930 in the federal court of appeal,[2d] in Slee v. Commissioner of Internal Revenue.[175] The case involved the deductibility of gifts to the American Birth Control League. One important purpose of the League was to obtain the repeal of legislation dealing with contraceptive devices. The Commissioner of Internal Revenue had denied the league charitable status, charging that dissemination of "controversial or partisan propaganda" was not educational. Judge Learned Hand, one of the foremost American judges, upheld the commissioner's decision. His reasoning was that: "Political agitation as such is outside the statute, (granting tax exemption), however innocent the aim, though it adds nothing to dub it "propaganda," a polemical word used to decry the publicity of the other side. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them."[176] However, Judge Hand did not hold that all political activities by charities was prohibited. If they were incidental to the charitable organization's tax exempt function political activities were permissible. He cited as examples a society to prevent cruelty to animals or children, or a state university, whose lobbying activities were "mediate to

the primary purpose, and would not ... unclass the promoters. The agitation is ancillary to the end in chief."[177]

Both the reasoning and the authoritative basis of Slee v. Commissioner I.R. were criticized by American commentators. However, in 1934 the income tax legislation was amended to substantially implement decision. It is unclear why the amendment to the Internal Revenue Code was made. The legislative history of the amendment does not indicate that the legislators concluded that it was inherently improper for charities to engage in political activities. Instead it appears that they wished to restrict political activity motivated by self-interest. In justifying the provision one member of the Finance Committee pointed out that there was "no reason in the world" why a contribution should be deductible if it were "a selfish one made to advance the personal interests of the giver of the money."[178] But apparently the committee was unable to draft a sufficiently narrow provision to cover only cases where the donors had a personal interest; therefore, a more general prohibition against political activity was enacted along the lines of the decision in Slee.[179]

The amended legislation provided that contributions to charities were deductible only if "no substantial part of the activity of (the charity) is carrying on propaganda, or otherwise attempting, to influence legislation ...." The provision obviously raised two important interpretative problems: What sort of activities constituted "propaganda" or "attempting to influence legislation"? When did the amount of such activities become "substantial"?

For many years the Treasury failed to draft guidelines answering either of these questions. As a result a good deal of case law developed, in particular, around the meaning of the concept "substantial." Some courts suggested a quantitative test, for example, if more than five percent of an organization's activities were political that would be "substantial." However, other courts rejected the percentage test and sought to balance the political activities of an organization in the context of all the facts and circumstances relating to the organization in order to determine whether a substantial part of its activities was to influence or attempt to influence legislation. Even though there were a fairly large number of cases on the issue, the courts failed to develop any generally accepted guidelines on what was meant by "substantial" activity to influence legislation. Each case was considered on an ad hoc basis.

As citizen involvement in lobbying activities increased, particularly during the 1950s, the uncertainties of the law became a source of frustration for charitable organizations. Finally, in 1959 the Treasury issued regulations in which it attempted to define with more precision under what circumstances an organization would lose its charitable status for engaging in political activities.

Basically, section 501(c)(3) of the U.S. Internal Revenue Code[180] provides that an organization will be exempt from tax it if is "organized and operated exclusively for ... charitable ... purposes." The regulations elaborating on this section, which were promulgated in 1959, provide that an organization will not be regarded as operating exclusively for an exempt purpose if it falls within one of three classes of "action" organizations.[181] An "action" organization is defined, in part, in the relevant subdivisions of the regulations as follows (the headings have been added):

> (ii) Substantial legislative advocacies: An organization is an "action" organization if a substantial part of its activities is attempting to influence legislation by propaganda or otherwise ... An organization will not fail to meet the operational test merely because it advocates, as an insubstantial part of its activities, the adoption or rejection of legislation.
>
> (iii) Political campaigning: An organization is an "action" organizaton if it participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office ...
>
> (iv) Primary legislative objective: An organization is an "action" organization if it has the following two characteristics: (a) Its main or primary objective or objectives (as distinguished from its incidental or secondary objectives) may be attained only by legislation or a defeat of proposed legislation; and (b) it advocates, or campaigns for, the attainment of such main or primary objective or objectives as distinguished from engaging in non-partisan analysis, study, or research and making the results thereof available to the public. In determining whether an organization has such characteristics, all the surrounding facts and circumstances, including the articles and all activities of the organization, are to be considered.

These regulations provided little assistance in clarifying what constituted prohibited political activities. No attempt was made to give any quantitative content to the key word, "substantial." Also it was not clear from the regulations what types of supporting activities were to be included within the scope of "attempts to influence legislation." But the regulations did make it clear that prohibited political activities included not only direct contacts with legislators, but also general education urging the public to contact their legislators.

Agitation for removing the restrictions altogether or at least for more specific guidelines continued. This pressure increased after 1962 when a provision was enacted permitting corporations to deduct the costs of direct lobbying. One indication of this pressure is the proliferation of law review articles, generally in favor of further liberalization, in the 1960s.[182]

A number of widely-reported cases brought by the IRS against certain tax-exempt organizations resulted in strident demands in the late 1960s for law reform. The most publicized cases were ones taken against the Sierra Club and a number of public interest law firms.[183] Commentators complained that there was no way of determining when an organization's activities had become politically substantial. This, in turn, lead to serious charges against the IRS of selective and random enforcement practices. Many alleged that there was ample evidence of administrative whimsy in both the Sierra Club and the public interest law firm investigations.

The urgency for legislative reform increased after a number of challenges were initiated to the constitutionality of the Revenue Code's restrictions on the deductibility of donations to charities' lobbying programs. The constitutional challenges included challenges on the grounds of impermissible vagueness, denial of equal protection and restriction on free speech.[184]

In 1969 the American Bar Association initiated intensive debate on the subject by recommending that the law be liberalized to permit public charities to communicate freely with legislators and with their own members and constituents about legislation directly affecting their exempt purpose or function. In 1976, after seven years of exhaustive, and countless proposals and bills had been introduced and debated in Congress, the Tax Reform Act of 1976 implemented new legislation. This legislation will be reviewed below. However, it might be noted that it appears from various hearings and articles written on the introduction of the new legislation that the major concern of Congress was with the uncertainty of the rules that existed at that time. They were concerned that the lack of clarity had lead or might lead to subjective enforcement. Also they appeared concerned that the severe sanctions that were imposed if the rules were breached (the only unambiguous action which IRS could take in the case of violations as a practical matter was to withdraw a charity's "deductible status") presented an enforcement problem. The various congressional reports on the bill generally did not take the position the charities are discriminated against as compared with business groups, nor that the old rules were constitutionally suspect. Also, Congress did not appear concerned about overly partisan lobbying by charities, at least to the extent it was permitted by the legislation.[185]

Before looking at that legislation, it might be noted that in the late 1960s the taxation and regulation of tax-exempt private foundations came under the close scrutiny of a number of congressional committees. One aspect of this investigation related to

the political activities of private foundations. A number of concerns were expressed: the activities of some private foundations were seen as being too closely related to particular political parties and even particular political candidates; large foundations had a large advantage over smaller ones in engaging in political activities since the substantiality test for prohibited political activities was gauged in relation to total activities; and some political activities of private foundations were perceived as being in furtherance of the self-interest of their major doners.

Therefore, the Tax Reform Act of 1969 prohibited entirely private foundations from engaging in political activities.[185(a)] The prohibition is subject to three exceptions which permit the private foundation (1) to make available the results of non-partisan analysis, study or research; (2) to furnish technical advice or assistance to response to requests by governmental bodies; (3) to attempt to influence legislation concerning the existence of the private foundation, its powers and duties, its tax exempt status, or the deduction of contributions to it. In the event expenditures are made by the foundation for prohibited activity, they are deemed to be "taxable expenditures" and are subject to a system of taxes determined by the amount of funds so expended.

B Present U.S. Law[186]

The present U.S. law is complicated by the cross referencing and the inter-related treatment of various tax-exempt organizations. However, the statutory framework can be explained simply.

Certain organizations, often referred to as section 501(c)(3) organizations, are entitled to have their income exempt from tax and also to receive tax deductible charitable contributions. These section 501(c)(3) organizations include corporations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes."[187] However, these organizations are only to maintain this status provided "no substantial part of these activities of ... is carrying on propaganda or otherwise attempting, to influence legislation, (except as otherwise provided in subsection(h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

This was basically the law before 1976, and it remains the law. In 1976 the exception in section 501(h) from the "no substantial part of their activities" test in section 501(c)(3) (which is referred to in the above paragraph) was added. Under section 501(h), most charitable (section 501(c)(3) organizations are allowed to elect to have a mechanical expenditure test apply in lieu of the "no substantial part of their activities" test. Organizations whose expenditures on political purposes normally remain within ceilings set by section 501(h) will not lose their exemption. The ceilings consist of 150 percent of a "lobbying

ceiling amount" and a "grass roots ceiling amount." These test in turn are set forth in section 4911 and essentially are percentages of the exempt purpose expenditures of an organization. The details of these sections are discussed below.

It remains to be noted in this brief review of the present U.S. law that while an organization that engages in political activities cannot receive tax deductible contributions, it can receive tax exempt status. Instead of being referred to as "charitable" such organizations are usually called "social welfare" groups. (This is the term used in the Code to refer to them, see section 501(c)(4).) Many charities that wish to engage in a significant amount of political activities, such as the Sierra Club or the League of Women Voters, will establish an organization that will engage only educational activities and thus qualify to receive tax deductible contributions. They will also establish an affiliated organization that will engage solely in political activities and will qualify as a so-called social welfare organization, which entitles it to tax-exempt status; but not the ability to receive tax deductible contributions.

The details of the U.S. law can perhaps most usefully be reviewed by asking a series of questions that would have to be resolved by legislation if specific limits are placed on the political activities of charities in Canada.

1 Should an organization be able to elect to come within the detailed rules or have a vague test such as "unsubstantial" or "auxiliary" apply to its activities?

In the U.S., the law prior to the 1976 changes remains in effect. The new rules apply only to organizations that elect to have them applied. The reason for retaining the old law and making the new law elective was that the new law imposed considerable compliance costs on charities. Thus, by not making the election small organizations or organizations that only infrequently engaged in political activities could avoid being burdened by the additional accounting requirements imposed by the new rules. In addition, church groups were concerned that the auditing of the totality of the charity's receipt and disbursement, as required by the new law, involved an undesirable involvement of the government in affairs of religious organizations. Church groups were also disturbed at the possibility of a "taint" that might result from definitions in the proposed legislation. Thus churches cannot make the election.

2 How are the resources that a charity can devote to political activities to be quantified?

The obvious way of defining the amount of resources that a charity can devote to political activities is by reference to some percentage of its total expenditures. However, this would provide a clear advantage to large organizations. The U.S. law attempts to remove some of this discrimination by providing a sliding scale

for determining whether the lobbying expenses constitute a substantial portion of the organization's activities. That is to say, the larger a charity's budget, the smaller percentage it can spend on political activities.

In effect, the legislation provides that every charitable organization may spend a basic amount, called the "non-taxable amount" to influence legislation. The "non-taxable amount" is determined as a declining percentage of total "exempt purpose expenditures." Exempt purpose expenditures include the total amount spent in the year on charitable activities. The limit on the non-taxable amount is computed as follows: 20 percent of the first $500,000, plus; 5 percent of any additional expenditures. There is an upper limit of $1 million on the amount that can be spent on lobbying expenditures. Thus under this scheme smaller groups may spend proportionately more on influencing legislation than their larger competitors. To prevent the use by one group of numerous organizations to avoid the effects of the decreasing percentages test or to avoid the $1 million limit on lobbying expenditures, special rules for affiliated organizations had to be promulgated.

3 What type of activities will be included within "attempts to influence legislation?"

In the U.S. legislation on the term "influencing legislation" is defined broadly as any attempt to influence any legislation. This includes attempts to affect the opinion of the general public ("grass root lobbying") and communications with any member or employee of a legislative body or with any other governmental official or employee who may participate in the formation of legislation ("direct lobbying").

It might be noted that a separate limit, within the general public on legislation matters. This so-called "grass roots lobbying limit" is one-fourth of the amount permitted under the general limit on "non-taxable amounts" described above. The U.S. legislation imposes this special limit on grass roots lobbying because business corporations in the U.S. are generally prohibited from deducting expenses of grass roots lobbying.

The 1976 Act excludes five categories of activities from the term "influencing legislation"; therefore, no expenditures in these categories are assessed against the "non-taxable amount." These categories are: (1) making available the results of non-partisan research; (2) providing technical advice or assistance in response to a written request by a committee or government body; (3) self-defence lobbying with respect to a possible decision of a legislative body which might affect the organization's existence, powers, tax exempt status, or the deduction of contributions to the organization; (4) communication with bona fide members on matters of direct interest, so long as they do not directly encourage the members to urge non-members to influence legislation or directly encourage the members to urge non-members to influence legislation, and; (5) generally, all communications with

governmental officials or employees other than those expressly defined as attempting to influence legislation. The legislation contains a series of complex definitions to implement these guidelines.

4 What are the consequences of exceeding the limit of permissible expenditures on political activities?

An important feature of the new U.S. law is that it provides a "cushion" for excessive lobbying expenditures by a charitable organization. Under previous legislation if a charitable organization engaged in substantial political activities it lost its tax-exempt status. Under the present legislation, violation of the allowable expenditure limit results, in the first instance, in a "tax," which is really a type of penalty for exceeding the limits. This tax is in the amount of 25 percent of the excess.

C Constitutional Challenges to U.S. Law

The restrictions in the U.S. law on the lobbying activities of tax-exempt organizations have been under constitutional attack since 1973 when Thomas A. Troyer, a Washington lawyer, published a law review article suggesting they violated a number of constitutionally protected rights.[188] The major protagonist in these attacks has been a tax reform organization, Taxation with Representation, and related organizations. After numerous procedural wrangles they finally argued and received a judgment on the merits of their constitutional claims in 1978. The Federal Court of Appeal, Fourth Circuit, held in a 2-1 decision that the restrictions were not unconstitutional.[189]

A new organization was formed, Taxation with Representation of Washington (TWRW), and the ground laid for another challenge. Again after numerous procedural and other hearings, the case was heard en banc by the full court of appeals in the District of Columbia Circuit.[190] This court in a majority judgment declared the restriction unconstitutional and remanded the case to the district court with an instruction that a hearing be held to determine the appropriate remedy.

Since there is now a conflict of decisions between two federal courts of appeal on the constitutionality of the lobbying restrictions, the United States Supreme Court has granted leave to appeal. The case will be heard before that court this spring.

Before reviewing the reasoning of the District of Columbia Circuit Court of Appeals, the somewhat limited nature of the argument should be noted. Section 501(c)(3) of the Internal Revenue Code conditions the tax-exempt status of charitable organizations on the requirement that "no substantial part of (their) activities ... (b) carrying on propaganda, or otherwise attempting, to influence legislation." This restriction applies to all so-called charitable organizations except veteran's organizations. Thus veteran's organizations are allowed to engage in unlimited lobbying activities without jeopardizing their tax-exempt status.[191]

It is this disparate treatment between tax-exempt organizations that has provided the firmest foundation for a constitutional challenge to the lobbying restrictions. Indeed, when it remanded the case to the district court to frame the relief, the Court of Appeals of the District of Columbia suggested that the appropriate remedy might be simply to extend lobbying restriction to veterans' organizations.

In the appeals court, TWRW challenged the lobbying restrictions on the grounds that they infringed both its right to free speech (First Amendment rights), and its right to equal protection (Fifth Amendment rights). The court found that TWRW "has no compelling claim based solely on the First Amendment" since the section 501(c)(3) restrictions do not directly abridge its rights of free speech. The court concluded "charitable organizations are simply not required to waive their first amendment rights in order to obtain public benefits - they simply may not lobby with tax-deductible contributions." But the court went on to point out that "this is not a situation in which the government refuses to impartially subsidize all lobbying activities." Therefore the unequal treatment required strict scrutiny.

The most obvious way that charities are discriminated against under the IRC is that although there are restrictions on their right to lobby, trade and business associations can deduct all of their lobbying expenses. However, in the court of appeal this argument was thought to be of such little merit, as an argument to base a constitutional challenge on, that TWRW dropped it. They stated that they dropped it "because the right to deduct a (business) expense is not comparable, for Equal Protection purposes, to the right to receive tax deductible contributions." Presumably, the major reason they are not comparable is that, as the court of appeal noted "Lobbying (for a business corporation) is a cost of doing business, and the deduction of lobbying expenses permits a more accurate measurement of a business' net income." However, the TWRW did urge that "this disparate treatment (of business expense) is an important element of TWRWs First Amendment claim since it demonstrates a lack of government neutrality toward lobbying and undercuts any possible claim that lobbying per se ought to be discouraged as an undesirable activity."

The court analyzed in detail the TWRWs equal protection arguments that were based on the differing tax treatment of tax-exempt groups that can lobby, such as veteran organizations, and those that cannot, such as charitable organizations. The court found that the existing statutory pattern in section 501(c) of the Code "involves unequal levels of government subsidy of First Amendment rights ... " The court then sought to find what compelling government interests, if any, were served by the differing treatment of charities as compared with veteran groups. The court concluded, first, that the legislative history of section 501(c)(3) "fails utterly to demonstrate that Congress restricted the lobbying of charitable organizations because of special problems in that area alone." It then went on to conclude, on the basis of further analysis of the statute, that "No identifiable

governmental interests justify the differential tax treatment of lobbying by veterans groups and section 501(c)(3) organizations." They, therefore, remanded the case to the lower court, to hear evidence from the veterans organizations, and to fashion an appropriate remedy. However, before the case could be heard there the government appealed to the Supreme Court of the United States.

It is interesting to note that the district court had held that three "legitimate governmental purposes" were served by the lobbying restrictions on charities: "assurance of governmental neutrality with respect to the lobbying activities of charitable organizations; prevention of abuse of charitable lobbying by private interests; and preservation of a balance between the lobbying activities of charitable organizations and those of non-charitable organizations and individuals." The court of appeal accepted only the middle ground as justifying a distinction between veterans organizations and all other charities. The first ground - the preservation of governmental neutrality concerning lobbying - could not be accepted, reasoned the court of appeal, once business corporations were allowed to deduct their lobbying expenses. As the argument that the restriction was necessary to preserve a balance between charities and other groups or individuals, the court noted "there is no indication that charities had become so powerful (when the prohibition was imposed) that they threatened to drown out the voices of those whose lobbying was not similarly subsidized."

Another recent case illustrates another possible constitutional challenge to restrictions on the rights of charities to lobby. In Abortion Rights Mobilization v. Regan[192] a number of abortion rights groups and individuals challenged the IRS's grant to section 501(c)(3) status to the Catholic Church in light of the Church's political campaign to elect anti-abortion candidates. The abortion groups argue that the IRS has failed to apply the section 501(c)(3) restriction against substantial lobbying to the Catholic Church, but that no organization "with different views on the abortion recovery controversy has been granted tax exempt status under section 501(c)(3) while being permitted to participate in electoral politics."

On a number of preliminay notions, the United States District Court, (S.D. N.Y.), held that some of the plaintiffs had standing to raise the constitutional challenges. It also held that their allegations were sufficient to state a claim. Their main allegation was that the government's failure to revoke the Roman Catholic Church's tax exempt status on the basis of its involvement in the abortion controversy violated the plaintiff's right to equal participation in the electoral process and to be free from arbitrary government action that favors the political strength of some persons relative to others. The case is scheduled to be heard on the merits.

Filer Commission

To complete this brief review of the United States law, an excerpt from the Report of the Commission on Private Philanthropy

and Public Needs is set out below. This commission, which was chaired by John H. Filer, and is frequently referred to as the Filer Commission, conductd the most exhausted examination of the American voluntary sector in recent history. It was a privately funded commission, established in large measure because of the initiative of John D. Rockerfeller 3rd. The following is its discussion of the lobbying by tax-exempt organizations problem.[193]

INFLUENCING LEGISLATION

The relationship between the nonprofit sector and government is both complementary and competitive. On the one hand, the two sectors often perform related functions in various areas of society, at times and places relying on each other's assistance and co-existing in relative harmony.

On the other hand, as Chapter I has noted, a degree of tension and conflict, not necessarily unhealthy or socially unbeneficial, has marked relations between government and voluntary organizations and associations throughout history.

The ambivalence of this relationship is perhaps most clearly reflected today in the fact that for nearly six decades government, has, through the charitable deduction, encouraged a wide range of activity and influence by nonprofit organizations, and yet, for two thirds of that time, since 1934, it has specifically prohibited tax deductibility for any organization, a "substantial part of the activities of which" goes to "attempting to influence legislation." Government, in other words, encourages the nonprofit sector to do a great deal but specifically discourages it from trying to influence government itself.

Two principal rationales have been offered for this discouragement. The image has been evoked at various times of the corridors of Capital Hill swarming with lobbyists operating with huge "slush funds" from nonprofit organizations. The idea that tax immunity is a form of government subsidy is part of another argument: in this view government should not, but would, be in a position of subsidizing efforts to influence itself if it allowed tax-deductible organizations to lobby freely.

In recent years, however, there has been growing pressure to remove or relax the restrictions on attempting to influence legislation.

This pressure has developed because of a number of factors:

- In 1962, Internal Revenue Code provisions covering business taxes were amended to allow a business to deduct the costs of influencing legislation affecting the direct interests of that business. Deduction of dues to trade associations that lobby on behalf of a business's industry-wide interests has been permitted under the amendment. Thus an inconsistency exists wherein businesses and trade associations are able to lobby for their interests and to benefit from tax deductions for the costs of such lobbying, but nonprofit organizations and associations are allowed considerably less freedom to lobby or otherwise attempt to influence legislation without endangering their tax-deductibility status.

- Considerable uncertainty surrounds just what constitutes a "substantial part" of an organization's activities or "attempting to influence legislation." After 40 years of the tax-law provision, this uncertainty remains unclarified by either the courts or the Internal Revenue Service. One result is within the law, because in relation to their size their legislative activities make up no substantial part of overall activities. Smaller groups, however, lobby at the risk of treading over some ill-defined line and thereby losing their special tax status; as a result, they may hesitate to engage in lobbying activities to any significant degree at all.

- Less directly but perhaps most profoundly affecting attitudes toward such restrictions on nonprofit organizations is the change in the relative sizes of government and the nonprofit sector in recent decades. As government has expanded in relation to the nonprofit sector, the influencing of government has tended to become an ever more important role of nonprofit organizations. As nonprofit organizations provide smaller shares of health, education and welfare services, for instance, the ability to influence the larger provider-government becomes more important.

- "Public interest" and "social action" groups have been growing in numbers in the nonprofit sector; they may well represent a major new direction of the sector; and one of

their foremost roles has been precisely to influence legislation. Some groups such as Common Cause and the League of Women Voters have deliberately, if unhappily, adopted non-deductible status so as to be able to lobby without restraint. They feel that, while they are still able to enjoy tax-exempt status, the law should allow them to lobby and still to receive tax-deductible contributions.

- The constitutional question has been raised as to whether this inhibition against influencing legislation is an infringement of free speech and of the right to petition government.

Pressures to change the anti-lobbying restriction have resulted in a number of proposals and congressional bills in recent years. The American Bar Association in 1969 passed a resolution that advocated amending the Internal Revenue Code to allow a nonprofit organization to lobby with respect to legislation that was of direct interest to the organization. This resolution became the basis for a Senate bill two years later and since then various bills have been drafted in Congress with wide differences but the similar goal of easing or more clearly defining, but not totally removing, the restrictions on nonprofit organizations against lobbying and other means of influencing legislation.

RECOMMENDATION

Against this background of a long-standing barrier between voluntary organizations and government, the commission recommends:

That nonprofit organizations, other than foundations, be allowed the same freedoms to attempt to influence legislation as are business corporations and trade associations, that toward this end Congress remove the current limitation on such activity by charitable groups eligible to receive tax-deductible gifts.

The only major restrictions in this area that the commission believes can be fully justified are:

Those that would prevent a person or group from being able to set up an organization to campaign for a particular piece of legislation

and then deduct from income taxes the expenses of running such an operation. Therefore, the commission recommends that organizations receiving tax-deductible gifts must be required to have broader charitable aims and functions apart from any immediate legislative activities.

Prohibitions against a nonprofit organization's supporting or opposing a candidate for public office.

Maintaining the current total prohibition against lobbying by private foundations.

Otherwise, the commission believes that there should be no restrictions, linked to tax deductibility, on what the commission feels has become an increasingly important role of the nonprofit sector and a major part of the philanthropic process.

PART V DEVELOPMENTS IN ENGLAND

A The Charity Commissions, 1969-81

In England, charities engaging in political activities were not seen as a serious problem until the 1960s. Before that time, none of the various commissions that had studied the problems of the voluntary sector had even addressed the issue.

By 1969, however, the Charity Commissioners were sufficiently concerned about the increasing number of organizations that were engaging in political activities and were applying for registration as charities that in their annual report for that year they provided detailed guidelines relating to permissible political activities of charities. The relevant paragraphs of their annual report are reproduced below.

POLITICAL ACTIVITIES BY CHARITIES

7 We have remarked from time to time in our previous reports on the difficulties which face us, particularly in the discharge of our quasi-judicial functions, in applying the law of the charity to new activities which grow out of the constantly changing needs of society. In a world in which the pace of social change seems ever to be increasing we shall inevitably continue to be faced with new or extended activities, the charitable nature of which has never been subject of consideration by the courts. We are, however, often bound to consider how far such activities may properly be regarded as consonant with charitable purposes both in connexion with our responsibility for registering charities and with our function of giving advice to charity trustees.

8 One contemporary development which has given us some concern has been the increasing desire of voluntary organizations for "involvement" in the causes with which their work is connected. Many organizations now feel that it is not sufficient simply to alleviate distress arising from particular social conditions or even to go further and collect and disseminate information about the problems they encounter. They feel compelled also to draw attention as forcibly as possible to the needs which they think are not being met, to rouse the conscience of the public to demand action and to press for effective official provision to be made to meet those

needs. As a result "pressure groups," "action groups" or "lobbies" come into being. But when a voluntary organization which is a charity seeks to develop such activities it nearly always runs into difficulties through going beyond its declared purposes and powers. No charity should, of course, undertake any activity unless it is reasonably directed to achieving its purposes and is within the powers conferred by the charity's governing instrument.

9 This development has resulted in our having to consider in a number of different contexts the extent to which individual charities may properly engage in activities which may be described generally as of a political nature, and further whether it is possible for us to indicate in a general way what in our view are the pitfalls for which charities must be on the lookout. We endeavor in the following paragraphs to give some guidance on this matter, but we would emphasize that the law is based on a limited number of decided cases and there is some danger in trying to stretch them to cover the whole of the ground. In the last resort any particular case must be judged on all circumstances pertaining to it, and what we say below must be regarded as guidance of only the most general kind which may well need to be modified when applied to individual cases. We are always ready to give our opinion on any particular case where the trustees are in doubt, although many charities likely to come into contact with this problem will have their own legal advisers to whom they should turn for advice in the first instance.

10 It is a well-established principle of charity law that a trust for the attainment of a political object is not a valid charitable trust and that any purpose with the object of influencing the legislature is a political purpose. Thus no organization can be a charity and at the same time include among its purposes the object of bringing influence to bear directly or indirectly on Parliament to change the general law of the land. If the governing instrument of an organization were to give it power, other than in a way merely ancillary to some charitable purpose, to play a part in bringing political pressure to bear, that by itself would throw serious doubt on the organization's claim to be a charity. Thus it is very unlikely that it will lie within any charity's purposes and powers to sponsor

action groups or bring pressure to bear on the government to adopt or alter a particular line of action. In the past it was recognized that such activity lay well outside the true field of charity although, as will be mentioned below, there are other more traditional approaches to Parliament and to the government that have long been accepted as perfectly proper for a charity. Today, however, it seems that the limitations on action of this kind are not always recognized by those responsible for running charities.

11 Those trustees who feel that their charity should become involved in the political field frequently seek to justify such action as coming within the field of "education." In our report for 1966 we mentioned the misuse of this word in the governing instruments of some organizations applying for registration as charities. Increasingly we are confronted by attempts to represent as educational a variety of activities which are primarily of a propagandist nature and which accordingly cannot be accepted as coming within the meaning of the "advancement of education" as it is used in charity law. There is a similar tendency for those registered charities which have as a subsidiary object the education of the public in the particular aspect of charity with which the organization is concerned (for instance the need for the relief of poverty in underdeveloped countries) to overstep the boundary of what might properly be described as education and pass outside their declared purposes into the field of propaganda. There is obvious difficulty in determining exactly where this boundary lies but if a charity with general objects, such as the relief of poverty or distress, issues literature urging the government to take a particular course or organizes sympathisers to apply pressure for that purpose to their elected representatives, we think it is clear that the boundary has been overstepped.

12 We would emphasize that it is not for us to judge whether the object of a propagandist or political activity is morally or socially right or wrong although we can appreciate the reasons why some charities feel a moral obligation to attempt to influence policies. We are concerned simply with the law of charity and with seeking to ensure that funds which are impressed with charitable trusts are used

for the purposes of those trusts and not for other purposes which could not be recognized as charitable. However small the proportion of the income of a charity which may be used in this way, we believe that the charity will be led into difficulties if it appears to be giving its support to any objects that are not strictly within its charitable purposes.

13 We have, where it seemed to us to be necessary, brought these considerations to the notice of individual charities. We are aware, however, that there may be other charities, which have perhaps not yet discussed their problems with us, and which are hesitating about promoting their objects by activities which might perhaps be considered to be political activities. We believe that it might help charities to realize what they have power to do if we point the contrast by giving some examples of such activities which we believe can justifiably be regarded as being proper for a charity. These examples fall into three classes, the first and third of which present little difficulty. The first class comprises those examples in which it is the government itself which is investigating or has propounded proposals for changes in the law. Government officials frequently seek advice and information from those who are responsible for running charities and the charities quite properly respond. Similarly by publishing a green or white paper the government may impliedly invite comments from the public generally and a charity may justifiably avail itself of such an invitation to make any comments which may appear to be useful. Again when a parliamentary bill has been published a charity will be justified in supplying relevant information to a member of either House and such arguments to be used in debate as it believes will assist the furtherance of its purposes. So also, there can be other cases, not involving legislation, in which a charity is entitled to persuade a member to support its cause in Parliament, for instance, where the question arises whether a government grant is to be made or continued to a particular charity.

14 The second class of examples, which includes those in which the charity itself or with others wishes to put forward proposals for changes in the law, can be more difficult to justify. It is probably unobjectionable

for a charity to present to a government department a reasoned memorandum advocating changes in the law provided that in doing so the charity is acting in furtherance of its purposes. On the other hand, a charity can only spend its funds on the promotion of public general legislation if in doing so it is exercising a power that is merely ancillary to its charitable purposes. But here again difficulty arises in defining the boundary between what is merely ancillary and what amounts to adopting a new purpose in itself. A charity would be well advised to seek either from its legal advisers or from us before undertaking any such activities.

15 Finally, the third class of examples comprises cases, where although Parliament is involved, it appears to us that the reason for approaching it is not to be regarded as political. This, for instance, includes legislation that is only intended to confer enabling powers, such as the Sharing of Church Buildings Act which is mentioned in paragraph 36 to 39 of this report. By supporting the passage of this Act the various charities were seeking to obtain wider powers to carry out their purposes. Similarly, virtually all private bills are free from taint of political activities. A private bill is in the nature of litigation as much as legislation and the action of supporting or opposing such a bill resembles a court action and nearly always has no political tinge. We feel, therefore, that the principle laid down by the courts that a political object is not a charitable purpose should not be extended in such a way as to deny to a charity that right to promote or oppose private legislation which is enjoyed by public and private bodies in general. Thus in every session some charities, with our consent under section 19(7) of Charities Act, promote private bills which may set out to alter the constitution of the charity or to give it powers which only Parliament can confer. An example of such a bill in the present session is the National Trust Bill. The case mentioned in paragraph 23 and 24 of this report provides an example of a charity which in order to realize its charitable purposes played a part in opposing a private bill.

16 There are two general points which we should like to mention in concluding this section of our report. First, if the trustees

> of a charity do stray into the field of political activity their action will be in breach of trust and those responsible for the action could be called on at law to recoup to the charity any of its funds which have been spent outside its purposes. Moreover a charity is not entitled to tax relief on income which is not applied to charitable purposes. But the fact that political action had been taken in the name of charity would not affect its status as a charity nor constitute a reason for removing it from the register of charities. If, however, doubt had been cast on the correctness of the original registration removal might be considered by us or by the High Court on an appeal by any other body interested. Secondly we think it should also be borne in mind that if charities step outside the sphere of activities to which the law confines them they may not only prejudice the support they receive from some people, who could resent the new activities, but they may also eventually endanger the privileged position which charities as a whole have been accorded by the state. The attempts now being made in the United States to curtail the privileges enjoyed by the charitable foundations there result in part from allegations that some of those foundations have been using their funds for purposes which are essentially political.

In 1973 the charity commissioners reproduced these guidelines in their annual report and confirmed their continued relevance. Over the next few years they continued to return in their annual reports to the problems of political activities conducted by charities. The relevant portion of their annual reports are set out below.

1976

POLITICAL ACTIVITIES BY CHARITIES

> 96 In our reports for 1969 (paragraphs 7 to 16) we commented on the extent to which charities may, in our view, properly engage in political activities without risk of being in breach of their charitable purposes, or of being removed from the register of charities on the grounds that the true purposes of the institution include political objectives and are not exclusively charitable in law.

97 We continue to receive some complaints about the activities of a few charities which are alleged to be engaging in political activities or propaganda and we are sometimes asked to consider removal from the register.

98 Most of the criticisms received recently have related to family planning, abortion and anti-smoking. We refer in paragraphs 54 to 61 of this report to a specific request to reassess the charitable status of the Family Planning Association (FPA). Although we concluded that there were no grounds for removing the association from the register it is clear that there are strong (and widely differing) views about the way in which the FPA carries out its work. The objections are not to the giving of the information and instruction but to an alleged lack of advice and guidance concerning the need for and value of restraint, lack of emphasis on the moral issues in the case of unmarried people, and possible encouragement of promiscuity. The association is also criticized for not drawing attention sufficiently strongly to the law relating to the age of consent and for campaigning for a reduction in that age.

99 The FPA denies that it is engaged in a campaign to change the law and does not accept that it fails to give proper advice on restraint and the moral issues, but it argues that greater emphasis on the moral issues would be unlikely to result in any great increase in restraint, and would almost certainly discourage those most at risk from seeking advice from the association, with serious and unhappy consequences.

100 Charities established to give advice on pregnancy such as the British Pregnancy Advisory Service and the Pregnancy Advisory Service are accused of being in league with the pro-abortionist lobby and of promoting abortion on request, and it is alleged that a very high percentage of the pregnant women who consult these charities go on to have abortions. But in our view it is no more than natural that a large proportion of the women who consult such a charity rather than their family doctor are likely to want abortions if these can lawfully be given. Whether an abortion is recommended in any particular case must depend on the facts of that case and on the medical advice based on those facts, and the charity cannot arrange an abortion if this would be unlawful.

101 Another criticism is that one or more of the trustees or officers of a charity holds office in some other non-charitable organization with political objectives. But there is no general law which prevents those who are trustees or officers of a charity from holding office in some other organization, or vice versa, which prevents such trustees or officers from expressing their personal views on any subject. Nor do the governing instruments of the particular organizations which have been criticized bar the members, trustees, or staff from holding office in other organizations. In any event, as we have explained in our earlier reports, a charity is not prohibited from engaging in political activities provided that these are carried out in furtherance of its objects.

102 These are sensitive subjects and ones on which people may have strong views for or against the charities' purposes and activities. But we can act only on a quasi-judicial basis. If there is any evidence, as opposed to unsupported allegations, to show that the trustees of any charity are acting in breach of their trusts, or are otherwise misapplying their funds, we are bound to consider it. But mere disapproval of a charity's objects and activities is not evidence.

1978

POLITICAL ACTIVITIES BY CHARITIES

21 During the year we had to review the activities of three international relief charities in the light of the guidelines which we consider charities ought to follow if involved in the political field. These guidelines contained in paragraphs 13 to 16 of our report for 1969 and we note that Lord Goodman's Committee concluded in their Report on Charity Law and Voluntary Organizations that by and large our views accurately reflect the present law.

a) War on Want

22 The charity started publication of a new magazine entitled "Poverty and Power." The contents of the magazine and the fact that it

had been issued by a charity were criticized in the press and we received complaints that many of the articles amounted to political propaganda. Other leaflets and publications of the charity were similar in character. We had to consider whether the charity's activities fell outside what the law allows. Accordingly, we invited the charity to discuss the matter with us.

23 At the meeting the charity's representatives were informed that, addition to the question of their publications, their activities on "research," promoting campaigns, and on certain aid projects also appeared to be open to criticism. "Research" into international trade unionism and investigation of the activities of tobacco firms, multinational companies, and defence expenditure seemed remote from the charity's object of conducting research into the causes of, and ways of relieving, poverty; and the campaigns on drug companies, the arms trade, the sale of powdered milk, multinational companies, and tobacco companies, appeared to be "propaganda" as defined by the courts. Gifts by the charity to certain overseas organizations, without any apparent requirement that the money should be used for purposes falling within the objects of War on Want, appeared to be too remote from the charity's objects.

24 We were told by the charity's representatives that the council wished a move away from the traditional forms of relief and to concentrate on overcoming the causes of poverty. Accordingly, increasing emphasis was being placed on supportive aid to self-help groups of the poor; on research into the root causes of poverty which lay in the social, economic and political structure of countries; on the results of that research; on campaigns to overcome the root causes; and on the publication of the opinions of the council which motivated that policy. The charity's representatives questioned our interpretation of the words "political," "propaganda," and "political activity," and argued that if some of their activities were political these were ancillary to their main objects.

25 In a subsequent letter to the charity we said that in our view the publications and activities in question lay outside the legitimate scope of the charitable field, and that

if these activities were to be continued it could only be by a separate non-charitable organization financed from moneys not contributed for charitable purposes. We have since been informed that the council have decided to cease publication of the magazine, to accept our guidance with regard to certain projects aided by the charity, and to seek further advice about the type of research and education which the charity can validly carry out in furtherance of its objects.

b) Oxfam

26 Land reform in the Third World was the theme which prompted the Director General of Oxfam to seek our guidance on a complaint made about an article written on the subject in an Oxfam publication. We accepted his assurance that the charity was concerned to maintain its traditional non-political stance and that the publication of the magazine represented only a small part of the charity's activities. Nevertheless, in our view the article was provocative and one-sided and came within the scope of political propaganda as defined in the courts. We were pleased to receive the Director General's assurances for the future.

c) Christian Aid Division

27 This charity has in the past made certain modest undesignated grants in the World Council of Churches' Commission on Churches' Participation in Development. According to the commission's 1978 Activity Report, it seeks to enhance political action, mobilize public opinion, and effect structural change within societies, in an attempt to tackle those causes of poverty which lie in the economic social and political structures of communities. We have advised the trustees of the charity that such activities are not within their objects nor within the scope of charitable endeavor as understood in this country. Accordingly, future grants to the commission, if any, should be given specifically for projects which are clearly charitable in law.

d) Generally

28 There is a risk that in mentioning these three cases we shall be understood as thinking that the law on political activities creates a

lot of difficulty for charities. This is not so. It happens that there were three cases in 1978 in which we felt bound to intervene, but in general the law presents no difficulty to the very great majority of charities. In the few cases where there is difficulty, this lies in discovering all the relevant facts, analysing them, assessing them, and then applying the law to them, rather than in uncertainty as to what the law is.

29 Our task in this context is not one of social, moral or political judgments the question is not whether the activities in question should be carried out, but whether they can properly be carried out by a charity. Our responsibility is to try to decide the legitimate scope of charitable activity on the facts of each particular case and to advise the charity accordingly. Nor - and there is a good deal of misunderstanding on this - is the penalty for infraction a loss of charitable status: infraction would be a breach of trust making the trustees personally liable for the expenditure in question.

1979

POLITICAL ACTIVITIES OF CHARITIES

a) Generally

18 During the year the extent of a charity's freedom to engage in political activities, at home or overseas, continued to attract attention. We set out below three illustrative cases that came to our notice, two on one side of the line and one on the other. Last year we featured overseas cases; this year we have selected domestic examples.

b) Abortion

19 In preparation for the General Election, the views of Members of Parliament and Parliamentary candidates about the recommendations of the Select Committee on Abortion were sought on behalf of three charities and several other organizations, with a view to circulating the replies to their supporters. Such an attempt to influence votes is clearly political and outside the proper field of

charitable endeavor. We made enquiries of the trustees and it transpired that the names of two of the charities had been used without authority and that in the case of the third the trustees had misunderstood the position. We were given assurances in all three cases that the trustees were concerned to confine themselves to the permissible area of activities.

c) Royal Society for the Prevention of Cruelty to Animals

20 Also in connection with the General Election, the Royal Society for the Prevention of Cruelty to Animals (RSPCA) sponsored an advertisement in several national newspapers and magazines by a body called the General Election Coordinating Committee for Animal Protection. The advertisement urged the public to write to Members of Parliament and Parliamentary candidates seeking their views on animal welfare, to attend political meetings to put forward their views, to find out where the local party stood in this respect, and to make their views known through the ballot box. The committee was not itself a charity. The RSPCA is established to promote kindness and prevent or suppress cruelty to animals and has power to arrange for the proper conduct of educational and Parliamentary activities in furtherance of those objects. While it is in our opinion, open to the RSPCA to press for legislation to prevent cruelty to animals, we took the view that it was improper for them to support a direct attempt to influence voters. We accordingly raised the question with the RSPCA, who had paid for the advertisement. We were informed that the RSPCA had acted on legal advice, but this advice had not taken adequate account of the guidelines we had suggested in our Annual Report for 1969 or of the views we had expressed to the RSPCA quite recently. In subsequent discussions representatives of the RSPCA agreed with our views and we were later assured that the Council of the RSPCA would seek our guidance in case of any future difficulty.

d) Howard League Penal Reform

21 A Member of Parliament took exception to a letter sent to Members by the Howard League for Penal Reform regarding a forthcoming

debate in the House of Commons on the death penalty. The league's action in sending out the letter was clearly a political activity, in that it sought to influence the decision of the House on a question that was due shortly to come before it. The fact that the league was seeking to persuade members not to change the law did not make the action any the less political. However, the courts have never said that no political activity may be carried out by a charity, and the decisive question was whether in this case the political activity was ancillary to the promotion of a charitable purpose.

22 In paragraph 13 of our report for 1969 we had expressed the view that in publishing a green or white paper a government impliedly invites comments from the public generally, and that a charity may justifiably avail itself of such an invitation to make its views known. Again, when a Bill has been published a charity will be justified in supplying relevant information and arguments to be used in debate to a member of either House if it believes these will assist the furtherance of its purposes. In the current case the Howard League's action was not far removed from these examples. The league is a focal point for thinking on penal reform and a large proportion of its activities has always consisted of lobbying Members of Parliament and making its opinions known to them. In our view the issue of the letter to Members of Parliament was close to the boundary between what is or is not permissible but, on balance, the league appeared to us in this instance to be engaging in a permissible activity ancillary to the promotion of its charitable objects which were directed to the promotion of, and education in, the sciences of penology and criminology and the constructive treatment of offenders. We concluded that there were not sufficient grounds to justify our intervention and so advised the Member of Parliament.

B The Expenditure Committee, Tenth Report: The Charity Commissioners and Their Accountability, 1974-75

The first government body to consider the issue of the political activities of charities in any detail was the Expenditure Committee. In 1974-75 it held hearings on issues relating to the voluntary sector generally, and issued a report on "The Charity Commissioners and Their Accountability."

During their hearings they received a good deal of evidence relating to the political involvement of charities and indeed stated that it was one of the main reasons for recent agitation for reform of the law. (See Expenditure Committee, Volume of Minutes of Evidence and Appendices, H.C. 495-11/ 1974-75, pp. 23, 25-26, 48-84, 117-18, 129-54, 313-14, 317, 349-50, 361-62.)

The evidence presented by the Charity Law Reform Committee and the Charity Commissioners provide a convenient overview of the kinds of evidence and concern the committee heard in relation to this issue. The Charity Law Reform Committee was an association of charities who were pushing for fundamental reform of many aspects of the law of charity. The following is that portion of their brief dealing with the problem of politics and charities:

> The Problem of Politics
>
> But the major defect of the present law is the exclusion of all political activity on the part of a charity - in theory, at least, for, as stated above, the law is unequally applied; and in any case it has been perceptively remarked that to be consciously and deliberately non-political is in itself a political act in favor of the status quo.
>
> The ban on politics is particularly unfortunate for organizations which consider that the bills affecting the people they exist to help can in the long run be successfully tackled only by political action. (For example Oxfam and Shelter, realizing that the relief work they can do is a puny effort compared with the size of the problem they face, might wish to persuade the government to do more in their own field. This is why the United Nations Association, the National Council for Civil Liberties the Campaign against Racial Discrimination, the Disablement Income Group and countless other no less worthy organizations are excluded from charitable status.
>
> The result is that politically orientated organizations attempt to get round the latter. There are two main ways of doing this: either the activities are curtailed and squeezed under some charitable heading (as with the Runnymede Trust, which does research on race relations under the heading of "education," but is debated from advocating any change in the law); or else the organization splits into two, one a charity and one not (as with the NCCL's Cobden Trust, Amnesty's Prisoners of Conscience Fund, the Martin Luther King Fund and the Martin Luther

King Foundation, and so on). In some cases these devices verge on the dishonest, and in all cases the line drawn between work done (usually by the same people) by one organization and the other arbitrary and artificial. The whole exercise involves much work and waste of time, requiring as it does separate accounts and records of time spent on each type of work.

Yet the legal basis for this ban on politics is not at all clear. Even the commissioners themselves, in their 1969 report, stated that they had to "emphasize that the law is based on a limited number of decided cases, and there is some danger trying to stretch them to cover the whole of the ground." But they make minimum use of the scope for "flexibility" that this might seem to give them to meet the changing needs of an age of change: instead they choose arbitrarily to interpret (or invent) a non-existent law.

The long term effect of the ban on politics is to change the role of charities and society from one of pioneering to one of supplementing the statutory, welfare services. In the past, and in particular in the nineteenth century, charities were at the forefront of social change. They pioneered subsidized housing, prison visits, care of the handicapped, labor exchanges, adult education and many other services now too often taken for granted. In those day the only possible method of ameliorating conditions was by approaching the general public for support. The government took little interest in social legislation, and charities played a major role in radical, pioneering work. With the advent of the welfare state the government took over much of the work previously done by charities. Many expected that charities would fade away. But there were gaps in the welfare state, and rising expectations and anomalies in the distribution of welfare brought to light many new problems and areas of need. At the same time, the improvement in communications and new sociological approaches showed that many problems were of such a size and so deep rooted that only government action could provide a satisfactory answer. Some charity workers were troubled that their small-scale voluntary efforts to relieve the worst need might merely delay protective action by the authorities. The sensible solution, consistent with the traditional pioneering role of

charities, seemed to be to investigate and define needs, to undertake small-scale pilot schemes, and to press the community, and the government as its agent, to accept their responsibilities and extend the welfare services. But this is precisely what the law does not allow. The ban on politics, enforced now more stringently than in the past, is placing many charities in a position of difficulty.

In their brief the Charity Commissioners made the following response to some of the issues raised about the political activities of charities:

Political Activities

2 A number of witnesses commented on what they consider to be the unsatisfactory state of the law relating to participation by charities in political activities and the commissioners' interpretation of the law. The opinion is expressed in the answer to Q741 that the commissioners have no clear idea of what they mean by "political" or "propagandist" and that the criteria they apply are out of date.

3 The commissioners' views as to the extent to which charities may properly engage in political activities were explained in paragraphs 7 to 16 of their Annual Report for 1969. As the commissioners explained in paragraph 5 of the memorandum to the sub-committee commenting on the evidence given before the sub-committee on 3rd February, the purpose of those paragraphs was to give charity trustees general advice on this topic which might prevent them getting into a position where their actions could be criticized. This was not a matter of misinterpreting the law (far less of changing it, which the commissioners cannot do but of trying to piece together the general principles which can be deduced from cases decided by the courts. In their report for 1972 the commissioners indicated (paragraph 7) that they did not think they could usefully add to the general advice given in 1969. The original advice was very carefully drafted and little has emerged since then which would justify any alteration in it. The commissioners have, however, again emphasized that they are willing to advise charities on particular problems which may arise.

4 The commissioners are aware that their suggested guidelines seem to have been misunderstood by some charities, which have construed them as indicating that charities may not engage in political activities of any sort. This is far from being the case and the commissioners consider that if their comments are examined carefully it will be clear that, in their view, political activities which are ancillary to the main objects of a charity are permissible. This is a matter of degree and does not depend on whether a charity is generally "acceptable," as suggested in the answer to Q807, or on the size, age or importance of the charity, as suggested in a number of other answers given. The answering of requests for information from government departments, referred to in the answers to Q758 and Q759 is clearly stated in paragraph 13 of the commissioners' report for 1969 to be permissible in their view. (The commissioners have no knowledge of the supposed letter from them to the Sunday Times mentioned in the reply to Q759.)

5 The commissioners explained in paragraph 10 of their 1969 report that the decisions of the courts show that an institution having as one of its purposes the object of bringing pressure to bear directly or indirectly on the legislature to change the general law of the land cannot be a charity. One of the essential requirements that must be satisfied before an institution can be recognized as a charity is that it exists for the benefit of the public or a sufficient section of the public. It is not unlawful to campaign for a change in the law but the court has no means of knowing whether the change advocated would be for the public benefit (Bowman v. Secular Society Limited (1917) AC406, Lord Parker of Waddington at page 442).

6 It should be explained that if a charity were to engage in political activities beyond the bounds permitted by law the result would not be an immediate loss of charitable status, but the trustees would be in breach of trust and at risk of being held personally liable by the court. If on the other hand the trustees could validly claim that the expressed objects of the institution were wide enough to cover such political activities, the question would naturally arise as to whether the institution

was in fact established for exclusively charitable purposes and the question of the continued registration of the institution as a charity would have to be considered.

7 It is said in the answer to question 820 that "the Charity Commissioners ... try to distinguish between informing the public as a matter of education and propaganda. This is a very dangerous and difficult decision, I think, because education is propagating idea, that are perhaps acceptable and propaganda is propagating ideas that are not immediately acceptable." We would comment in the first place that this reply again shows a misunderstanding of the commissioners' position. It is the courts who have drawn a distinction between education and propaganda and it is for the commissioners when considering applications for registration as charities to apply the law as laid down by the courts. In the case of re Hopkinson (1949) 1 All ER 346, at page 350, Mr. Justice Vaisey commented "Political propaganda masquerading ... as education is not education within the Statute of Elizabeth ... in other words, it is not charitable." The fact that a distinction has to be drawn between education and propaganda is further emphasized by the recent case of re Bushnell (1975) 1 All ER 721 in which Mr. Justice Goulding commented, "The testator never for moment desired the education of the public so that they could choose for themselves, but was trying to promote his own theory by propaganda." We feel that these judicial comments demonstrate that it is an over-simplification of the problem to comment as the witness did before the committee that "education is propagating ideas that are perhaps acceptable and propaganda is propagating ideas that are not immediately acceptable."

In view of the representations made to it on this issue, the Expenditure Committee made the following response and recommendation in their report:

Political involvement

35 Many witnesses expressed strong feelings about the difficulties confronting charities and would-be charities whose objectives, meritorious in themselves if pursued to a successful conclusion, inevitably meant that the promoters must engage in forms of political activity in order to gain their ends. The

Charity Commissioners maintain that it is a well established principle of charity law that a trust for the attainment of a political object is not a valid charitable trust and that influencing the legislature is a political purpose (H.C. (1974) 142). To take a recent example of their attitude, the commissioners refused to accept from the Organizing Committee for Animal Welfare Year 1976 who are seeking charitable status for their organization the inclusion of the following among the objects of associations: -

> The arousal of a determination on the part of the public to take prompt and decisive action to end the ill-treatment of animals whether such action is to be of a positive nature or of a more direct nature, e.g. action to encourage legislation for the increased protection, preservation and care of all animal life ...

36 Twice in their Annual Reports (H.C. (1969-70) 276 and H.C. (1974) 142) to the Home Secretary the Charity Commissioners have endeavored by detailed statements of the position, as they see it, to clarify the situation. Yet the position remains unsatisfactory.

37 A number of voluntary associations have a feeling of injustice in that it leaves them with the alternatives of either going it alone without the advantages of charitable status or dividing their organization into two or more parts in order to comply with the law. "It is," as the Chairman of the National Council of Social Service put it, "unfortunate that a body which wants to improve social conditions, and in so doing to agitate about possible changes in the law, may have to divide itself into two parts, one that can be officially registered as a charity, and one, the propaganda part of the activity, which cannot" (Q609). There are well known voluntary organizations, for example, the Disablement Income Group, which are by their nature heavily committed to secure changes in the law by arousing the public conscience and which have been obliged, either to resort to this device or even inhibited from seeking registration for any of their activities. This division, they say, causes extra office work, double bookkeeping and double production of annual reports (Q717). It also means that the non-charitable part encounters considerable, even

critical, difficulties, in seeking finance to maintain itself because potential donors prefer to give to registered charities (Q698). This has been confirmed to us by at least one grant giving charity, the Children Charity Fund.

38 The general feeling of most of our witnesses is that political activities in pursuit of charitable objectives and ancillary to them should be permitted to a greater degree than the Charity Commissioners have allowed in their decisions as to what is or is not charitable (Q806).

39 Lord Porter in a dissenting judgment in the House of Lord in 1947 (The National Anti-Vivisection Society v. Inland Revenue Commissioners 1948) said, "I cannot accept the view that the anti-slavery campaign or the enactment of the Factory Acts or the abolition of the use of boy labor to sweep chimneys would be charitable, so long as the supporters of these objects had not in mind or, at any rate, did not advocate a change in the laws, but became political and therefore non-charitable, if they did so."

40 We share this view. It is almost impossible nowadays when government are concerned in all spheres of human activity to pursue charitable objects without becoming politically involved. We find it difficult to follow the rule of thumb which the commissioners apply when they differentiate between various methods of political activity. For example, we fail to see why lobbying a Member of Parliament may in certain circumstances be permissible, but drafting a bill for securing an amendment in the law, even though in pursuit of charitable aims, is going too far (Qs 118 and 124). The commissioners themselves agree that a charity may indulge in political activity in pursuance of its main charitable objects without offending in any way. They also admit that these questions have not been treated in the courts and that "if some went to the courts the judges might decide differently" (Q124). At present, because of the cost of appeal, the High Court is deprived of the opportunity to clarify this area of uncertainty.

41 The Charity Commissioners contend that the matter has become a little distorted by recent publicity (Q1573). Yet they admit that the number of cases decided by the courts is limited and that they (the commissioners) have to "stretch" these decisions to cover the whole field and draw reasonable conclusions therefrom (Q1545). The ambiguity in the law may admittedly not be so serious as people imagine, but the uncertainty is bad not only for potential charities but also for the Charity Commissioners whose reputation for impartiality might be harmed in certain respects.

42 In the short term we consider that there is an urgent need for an up-to-date comprehensive judicial statement on the extent to which a voluntary association whose fundamental purposes are for the welfare of mankind may engage in political activities in order to secure its objectives.

43 We do not subscribe to the view that political parties themselves should be eligible for charitable status, but we feel that there are a number of deserving organizations which, because of the present uncertainty, are being held back from either applying for registration or even operating at all.

44 We recommend that when government legislate in the manner we have proposed, i.e. to make purposes beneficial to the community an essential criterion of charitable purposes, they will also ensure in such legislation that all political activities in pursuit of a charitable object shall, so long as they remain subordinate to the main purposes of the charity, not endanger its charitable status.

C Goodman Report, 1978

The Goodman Committee, whose genesis and terms of reference were described in Part I, devoted Chapter IV of their report to "Political Activity." They noted that at the outset of their inquiry it was clear "that the relationship between charitable and political activity would be one of the most important and difficult topics for us to consider." After describing the present law, namely, that charities are allowed to engage in political activities ancillary to their main objects, and the views of the Charity Commissioners, the committee summarized the differing viewpoints and their conclusions:

Differing Viewpoints

103 The large range of evidence presented to the committee on charities and political activity fell under the three broad categories:

(a) Political activity should be outside the scope of charity. The tax benefits enjoyed by charities are provided by the community and there is no justification for activities which involve exercizing pressure, directly or indirectly on central or local government being so provided; the term 'registered charity' has come to mean something special to the general public and the willingness of the public to continue to give donations to them could be undermined to the detriment of the charities themselves if they engaged in political activity; it is difficult to reconcile the concept of trusteeship with the exercise of opportunism and expediency which characterises political manoeuvre; it would be impossible to formulate a definition which could stop political parties setting up their own trusts from which the bulk of their funds would be derived.

(b) A number of charities told the committee that they found few problems working within the guidelines laid down by the commissioners in their report for 1969. However, they asked for generous interpretation of such guidelines. Such organizations have acted with the understanding and support of the commissioners but feel nevertheless that there is an element of doubt and uncertainty. Many of these charities considered that political activity which is ancillary to the pursuit of a charitable object is quite justified. However, the committee had evidence that some charities felt themselves inhibited in their dealings with government departments and some organizations shied away from applying for charitable status because of some doubt whether their activity would be considered political so that they would not be eligible to be charities. Evidence presented on behalf of the churches said that involvement in the realms of politics must be regarded as an essential manifestation of church life at times and nothing must be done which might hinder the churches from organizing deputations and doing what they can to influence public opinion as they did, for example, in the case of the slave trade.

(c) A further viewpoint was put to the committee that it should be permissible for charities to pursue political objects and that charitable reliefs should be extended to organizations with political objectives. It was argued that this would invigorate political life which is to the benefit of a democratic society. By changing emphasis from 'bandaging the wounds' of society to 'preventing the injuries' there would be an acceleration in progress towards a fairer society. This viewpoint was put forward by several bodies and individuals and was not without sympathy from at least one member of the committee.

Conclusions and Recommendations

104 In considering this matter the committee attempted to make a distinction between on the one hand advocating or promoting the continuance or change in the law or government policy or action and support on the other hand directly or indirectly to a political party or assistance to an individual or group to obtain elective office. The committee rejected any step which would enable charities to give financial or other support to political parties or to individuals or groups seeking elective office. With regard to other political activity ancillary to the object of a charity, the committee considered that there was a general lack of knowledge and understanding of the present law, many charities being under the impression that all political activity was prohibited to charities notwithstanding the contents of the Charity Commissioners' reports referred to in paras. 95 and 96 above. There is, however, no doubt that the dearth of case law and the general nature of the guidance given by the Charity Commissioners has resulted in great uncertainty which should, if practicable, be dispelled. It is clear that a rigid approach to this problem would be inappropriate. Rather than attempting some definition of permissible political activity we believe, as at present, that each case should be considered individually but in the context of newly formulated guidelines and that political activity should be subject to review, as in other cases, as recommended in Chapters VI and VII of this report. We envisage that the guidelines should prescribe:

(a) that political activity should not be an object of the charity nor a principal activity

such that its charitable object is in effect displaced by the extent of its political activity.

(b) that political activity should be and be seen to be ancillary to the object of the charity.

(c) that political activity should not include direct or indirect financial or other support for or opposition to any political party or individual or group seeking elective office, or any organization having a political object.

It is neither desirable nor acceptable for political parties to emerge camouflaged as charities. The committee has noted the special financial privileges given to political parties under Section 26(3) of the Finance Act 1975, relating to gifts to political parties and also the recent proposal to grant financial assistance to parliamentary parties. On balance the committee considered that it is more appropriate for organizations with a political purpose to pursue the argument for financial privileges in this quarter rather than by pursuing charitable privileges. To the extent that the adoption of such guidelines involves a change in the law, legislation will be required to implement this proposal. We are, however, uncertain whether such legislation would be necessary. In those circumstances it may well be argued that it is desirable to await the outcome of decisions of the courts in the future before contemplating legislation. This however, would expose trustees to the risk that they may be found to be acting in breach of trust and thus be made personally accountable for moneys expended in accordance with these recommendations. For their protection, therefore, legislation to clarify the position appears desirable.

105 We recognize that by maintaining a distinction between charitable and political institutions there may remain for certain bodies a problem relating to duality of function in cases where the political activity is outside the guidelines. This is, in our view, one which has to be accepted. Where a group of people promotes a body with charitable objects and another body with political objects it is said that the division is arti-

ficial. We disagree. The two institutions have different functions which should not be confused. We would indeed prefer to see greater separation rather than unification under a charitable banner.

In reaching our conclusions, we have naturally borne in mind that the word 'charity' has a moral connotation which itself attracts support and that some are concerned that the notion of a charity being permitted to become involved in political activity may detract from the special status accorded in the minds of many to charities. We recognize, also, that the liberty to undertake political activity within the limits we envisage has for many a moral connotation. Accordingly, provided those charities which choose to embark on such activities in the context we envisage make clear to the public what the context is in relation to the charity, we believe this may enhance rather than detract from the high regard in which charities are presently held. We stress in Chapter VII of this report the need for an annual statement by charities of their activities and we consider that a statement of political activity is no less important than other activities.

Summary of Recommendations

106 We therefore recommend that greater political activity should be permitted to charities subject to the guidelines referred to in paragraph 104.

PART VI ARGUMENTS FOR ALLOWING CHARITIES TO ENGAGE IN POLITICAL ACTIVITIES

The arguments for allowing charities to engage in political activities can be conveniently divided into seven types which will be discussed under the following headings:

A The changing role of the voluntary sector

B Improving the public policy-making process

C Removing the discrimination between charities and business organizations

D Respecting the constitutionally protected right to free speech

E Respecting rights of equal treatment

F The uninforceability of a prohibition on political activities; and

G The difficulties of distinguishing between "propaganda" and "education."

A Changing Role of the Voluntary Sector

At the theoretical level, the question of whether charities ought to be allowed to engage in political activities should be resolved by reference to the public policy that justifies granting charities and donations to them tax-preferred status. Of course, agreement on such public policy grounds is not likely to be charged with question-begging. However, it seems worth noting that the traditional justifications given for providing donors to organizations in the voluntary sector with a tax subsidy do not support an extension of these organization's activities to political activities.

Tax support for contributions to charities is frequently justified on the grounds that the government is compensated for its loss of revenue because the voluntary sector relieves it from financial burdens which would otherwise have to be met by the appropriation of public funds. Another common justification is that government financing of the voluntary sector through a matching grant scheme promotes pluralism by permitting individuals to select by donation those institutions in society that will receive public funds for the provision of public goods and services.

Obviously neither of these justifications support allowing charities to engage in extensive political activities. Indeed, since charities will most frequently be attempting to influence Parliament to spend more money for particular purposes, allowing them to engage in such activities stands the traditional justification for tax subsidies to the voluntary sector on its head. The argument does not deny that the political activities of charities

may help legislators better realize the needs of the country. It simply suggests that everyone involved ought to be aware of the implicit shift that such a change would make in the underlying rationale of a subsidized voluntary sector.

Many members of the voluntary sector argue, of course, that just such a shift has taken place in the role of the sector, and that is precisely why charities should be allowed to engage in political activities. They argue that in many traditional areas of charitable concern - such as the preservation of wilderness areas, health research, and overseas aid - legislation and other governmental activity is now often the most effective means of dealing with the relevant problems. And it is incongruous to deny charities access to the political arena when that is where action is likely to be taken which will vitally affect a charity's programs and goals. Indeed, for some organizations, such as those concerned with financing the needs of disabled people or of one-parent families, changes in the laws are not only the most cost-effective but virtually the only policy they can adopt in order to meaningfully achieve their charitable objectives.

Some commentators go so far as to argue that the most important role of philanthropy is no longer the support of private institutions performing essential public services, but rather to oversee, monitor and evaluate government and other institutions of society and to represent the interest of the powerless. The Filer Commission notes:

> As non-profit organizations provide smaller shares of health, education and welfare services, for instance, the larger provider - government becomes more important ... 'Public interest' and 'social action' groups have been growing in numbers in the non-profit sector, and one of their foremost roles has been precisely to influence legislation.[194]

This line of argument, if accepted, would lead to the conclusion that there should be no restriction on the political activities of charities. However, again, the difficulty with the argument is that it equates traditional charities with public interest lobby groups. Both of these types of organizations have quite different roles to play and it confuses clear thinking to equate them entirely. Given their different roles it might be that the government should use different policy instruments in financing them and a different set of regulations in controlling them. This difference, and the importance of keeping the two roles separate, is discussed in Chapter 4 of this paper.

B Improving the Public Policy-Making Process

Charities operate in many fields that are of concern to legislators such as health, welfare, education and environmental matters. Because of their intimate knowledge of these areas,

charities will be able to supply legislators with ideas and information relevant to proposed legislation. For example, in considering the budgeting, structuring and priorities of a health program, government policy makers and legislators would surely want the benefit of the ideas and information and even the views of the charitable health agencies. In considering pollution laws, a legislator would probably wish to weigh the arguments and supporting facts that could be presented by charitable organizations that have expertise and practical experience in the field.

This is a powerful reason for allowing charities to engage in political activities: to improve the public policy decision-making process by allowing charities to provide expertise and represent otherwise unrepresented views in the process of formulating legislation. The legitimacy of pluralistic democracy depends upon legislators being informed of the opinions of all interested parties.

Charities are often the only organizations that can act as spokespersons for what would otherwise be unrepresented viewpoints. Their constituents are often the handicapped, welfare recipients, medical patients and others who have no other way of making their views known.

As commonly stated, this argument has two parts. First, charities must be allowed to present information to legislators so that informed public decisions can be made. This concern can be by maintaining the general prohibition on their political activities, but then allowing charities to engage in certain defined types of activities such as presenting briefs and in other ways advising legislators of relevant facts and research. This is basically the solution adopted in the United States with respect to lobbying by private foundations.[2]

This argument also asserts that charities should be allowed to act as a lobby organization so that unrepresented opinions and viewpoints will be heard from. Stated in this way the argument simply restates the argument above about the changing role of the voluntary sector.

C Removing the Discrimination Between Charities and Business Organizations

Put at its strongest, this argument for allowing charities to engage in political activities notes that under the present law virtually all of the expenses of business associations in directly lobbying the government are tax deductible. In addition, the expenses of grass roots lobbying (often in the form of institutional or advocacy advertising) by business associations are similarly deductible.[195] Furthermore, the fees paid to trade associations, such as the Chamber of Commerce, the Canadian Federation of Independent Business and the Canadian Manufacturers Association, are tax deductible. All of those organizations spend a considerable amount of their resources lobbying the government and 'educating' the public. Thus, although the Act effectively bars

charities from participating in the legislative process on behalf of the public interest, it allows, and even encourages, lobbying on behalf of special economic and private interests. For example, a charity concerned about environmental protection cannot lobby against the Mackenzie Valley pipeline or attempt to persuade people that a decision to allow the construction of bad policy, but pipeline companies can deduct both the costs of direct lobbying for the pipeline and the advertising and other costs of persuading the Canadian public that it is a necessary undertaking.

Although this apparent discrimination strikes many people as unfair, it is important to note that it is clearly justifiable in tax policy terms. One of the most fundamental tenets of a 'fair' or 'neutral' income tax system is that business expenses are deductible but personal-choice expenditures are not. When a business incurs lobbying expenses it presumably does so in order to increase future income. When that income is earned it will be taxed. Lobby expenses incurred by a charity or an individual are personal consumption expenditures. Whatever the form of the return to the charity or individual, it clearly will not be taxed. The obviousness of this point can be seen from the fact that no one has ever argued (yet) that individuals should be able to deduct the cost of personal-choice lobbying. But, if charities are allowed to deduct such expenses, why not individuals? The answer is not self-evident, assuming that lobbying efforts that might bestow a pecuniary advantage (the value of which is not taxed) on an individual is excluded. Thus, persons who argue for deductions for charity lobbying are arguing for a greater subsidy for charity, not for an end to tax discrimination.

However, having concluded that in tax policy terms there is no discrimination between business and charities, two points might be noted. First, it is not obvious that business should be allowed to deduct for tax purposes the cost of lobbying. Much lobbying by business organizations, particularly grassroots lobbying such as institutional advertising, undoubtedly contains a large personal consumption element. Business people who advertise about the virtues of "free enterprise," for example, are not only concerned about increased future profits but are also undoubtedly reflecting a choice about the kind of economic system they personally prefer. More importantly, there is a public policy argument for disallowing lobbying expenses by business interests. This argument was given by the United States Supreme Court in 1959 in upholding IRS regulations prohibiting the deductibility of such expenses. In Cammerano v. United States[196] the Supreme Court noted that the denial of deductions for business related political activity "expressed a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned."

Since that time the U.S. legislation has been amended allowing for the deductibility of direct lobbying expenses by business organizations, but not grassroots lobbying expenses. The legislation has been a continuing source of controversy.[197]

A second point that might be noted is that to suggest there is no tax policy reason for subsidizing charities that are engaging in political activities, does not foreclose such subsidization for public policy reasons. And in assessing the strength of these public policy reasons, the fact that business obtains a tax deduction for such activities is a relevant, and indeed a significant, consideration.

D Respecting the Constitutionally Protected Right to Free Speech

The Canadian Chart of Rights and Freedoms provides that "Everyone has ... freedom of thought, belief, opinion and expression, including freedom of the press and other media communication." It has been suggested, and it will undoubtedly be argued with increasing vigor, that preventing charities from engaging in lobbying activities is an infringement of their constitutionally protected "freedom of speech."

The courts' interpretation of the new Charter of Rights is hard to predict. However, it is highly unlikely that the courts will hold that the prohibition of political activities on charities is an infringement of freedom of speech. Stated most broadly, the legal reasons for holding such a prohibition unconstitutional would have to run as follows. What the Charter forbids the government to do directly it equally forbids it to do indirectly. A direct ban on political speech by charities would be a violation of their right to free speech. Therefore, conditioning favorable tax-subsidy treatment for contributions to them is equally a violation of their rights.

There are a number of replies to this line of argument. First, the tax subsidy is given to donors. Donors are not required to give up their right to lobby in return for obtaining the deduction. Even though they claim deductions for their charitable contributions they may continue to lobby. To suggest that the rights of the charities themselves have been infringed places form over substance. Allowing charities to lobby would allow individuals to deduct their personal-choice lobbying expenses simply by pooling funds with like-minded individuals and forming a charitable organization.

Also it seems clear that the above statement of the constitutional doctrine of free speech is too broad. The government will presumably be prohibited only from unreasonably prohibiting freedom of speech. If important government or societal interests are at stake government regulation indirectly or tangentially affecting freedom of speech will undoubtedly be upheld. Thus, for example, political appointments will presumably still be allowed to be conditioned on forbearance from public criticism of public policy. The government interest in disallowing deductibility of donor's personal-choice lobbying (and thus not underwriting all forms of lobbying) seems sufficiently strong to foreclose constitutional challenge.

The constitutional arguments on this issue will undoubtedly acquire a considerable degree of sophistication. They will not be explored here. However, it might be noted that in the United States the restrictions on lobbying by charities have survived "free speech" constitutional challenges.[6]

E Respecting Rights of Equal Treatment

Another constitutional challenge to the prohibition might be on the grounds that it abridges the right to equal protection of the laws. The Charter provides that, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination." The present law might be said to discriminate between the following groups: charities v. businesses, trade association, unions; churches v. other charities; large charities v. small charities.

The constitutional doctrine that develops under this clause of the Charter will presumably not prohibit all legal classifications but only those that have no rational basis. The factual distinctions between conventional charities and businesses, trade associations and unions provide at least some support for different treatment in relation to lobbying. As explained earlier, there are also fundamental analytical tax differences between these organizations.

The discrimination between churches and other charitable organizations that arises because of the present law is more troubling. Many issues that the churches regard as moral questions, and therefore quite freely attempt to influence public opinion about, and directly lobby the government with respect to, such as abortion, capital punishment, homosexuality and birth control, others views as political issues. And yet although the churches are thus free to press their views on these issues, other organizations formed specifically to lobby or influence public opinion with regard to these matters would be denied charitable status.

The same kind of discrimination occurs between large and small-sized charities. A large mental health association, for example, which conducts programs of general education aimed at better public understanding of mental illness, volunteer services in mental hospitals and aid to research generally, can devote a considerable amount of resources to political activities relating to mental illness. Such activity would be regarded as being ancillary to the charity's main object. But an organization formed specifically to attempt to reform the laws relating to mental retardation would be denied charitable status. What might make this discrimination particularly 'suspect' is that the ability to exercise the right of free speech seems to turn on the relative 'wealth' of the organization.

Again, the possible constitutional arguments will not be explored in detail here. However, in public policy terms, the various forms of discrimination inherent in the present law are troublesome.

F A Prohibition on Political Activities Unenforceable

A major problem with virtually any rules limiting the political activity of charities is that their application will inevitably be uncertain. The difficulties of defining precisely "political activities" or "ancillary activities" (assuming that political activities ancillary to the charities purposes are to be allowed) are enormous. Furthermore, even if these terms could be defined precisely, the law could not be uniformly enforced. Revenue Canada, which is charged with the responsibility of applying the law even-handedly to over 10,000 organizations, would still face an impossible task. Enforcement would have to be highly selective because of the limited resources available to it.

The large area of indeterminancy that must remain in any attempt to limit the political activity creates a number of difficulties. First, the law would not give adequate notice of the type of behavior the statute is trying to control with the result that organizations may inadvertently breach the law - with dire consequences. Instead of simply affecting the tax consequences of specific income generating transactions, a breach in the law results in an organization losing its charitable status. Although a cautionary letter might be sent to an organization, no advance warning is necessarily required. Advance rulings will not be issued by Revenue Canada as to whether the activities of particular charities constitute prohibited political activities. Indeed, a system of advance rulings would not be a satisfactory resolution of the administrative problems created by the present law. Among other reasons, advance rulings would be time-consuming and burdensome to an organization, particularly since the need for political activity may arise quickly and strategies change as circumstances change.

A second difficulty with standards prohibiting political activities of charities is that they would, as mentioned above, inevitably lead to selective enforcement. Invariably, because of the subjective judgments required, enforcement risks being arbitrary and discriminatory. Those organizations singled out for enforcement are likely to be those whose goals are objectionable to particular Revenue Canada officials involved (in the U.S. one commentator has noted "a group may be singled out for review by an individual revenue agent reading the newspaper and shaking his head at the group's beliefs"); those whose views are politically embarrassing to the government; or, those who involve themselves in controversial issues. Allegations are frequently made that the present law is enforced discriminatorily by Revenue Canada. In view of their limited resources, Revenue Canada cannot be held to blame if the charges that the present law is enforced discriminatorily are true. For them a highly selective enforcement policy is not a matter of politics, but a practical necessity. But it must be noted that whether or not charges of arbitrary enforcement are true, the fact that they can be made is a matter of grave concern. Revenue Canada, more so than any other government agency, must be seen to be above politics. Tax administration is otherwise irreparably harmed. The problems of attempting to enforce vague standards are discussed in more detail below.

G Impossibility of Distinguishing Between "Propaganda" and "Education"

Under the present law, as discussed above, charities are not permitted to propagandize or attempt to influence broad social attitudes. This prohibition is usually subsumed under the general proposition that charities cannot engage in political activities. Many groups have suggested that the distinction between education and propaganda in this context is troubling, whether the propaganda is aimed essentially at grassroots lobbying or is aimed at simply influencing broad social attitudes. Of course, there are all the difficulties described above in relation to enforcing vague standards. However, in this area there are additional difficulties. For the sake of brevity, the concerns expressed will be simply listed.

1 The most significant problem involves attempting to distinguish between educational material and propaganda. Regardless of how they are defined, it is suggested that the difference is only apparent at the two extreme ends of the continuum which these two terms purport to separate. Some argue that all education is infected with the biases of the educator. If it is not apparent from the material presented, it is from the material that was not presented but might have been. The only real differences between the two is not what information they provide the reader, but the form in which it is presented. Thus, for example, one commentator has noted, "Advancement of inter-racial harmony ... can be described as education of different racial groups about each other's way of life, and propagation of right- or left-wing doctrines may be charitable if it can be described as education in political science."[198]

2 Even assuming there is a difference between propaganda and educational material, the line is so subjective that it provides a basis for the censorship of ideas, or at least differential state support for some ideas. The fact that distinguishing between "education" and "propaganda" leaves vast room for the reflection of a judge's or administrator's political biases is widely recognized. For example, a member of the U.K. Expenditure Committee made the following comment about the judge in Re Bushnell, a case in which the advocacy of socialized medicine was held political and therefore not charitable: " ... he was probably a Tory himself. Most of the judges are, in fact, right-wing reactionaries and, therefore, whatever one might have to say on the impartiality of the judges it is not always the case in a case like this where there might be a political context which might be at variance with the views of the judge."[199] Even if allegations such as this are unfounded they reveal the danger of involving judges in essentially political questions.

3 Even if an organization is "propagandizing" - presenting only one side of an issue - it is not clear that this is not in the public's interest. Even though a person is being presented with only one view, they are being educated. Having heard all views, from different organizations, they can then form their own

judgment. Indeed, if one reason that the advancement of education is for the public benefit is because it enables people to make educated judgments, then allowing them to hear from the strongest advocates of each side of an issue is arguably the best means.

4 Prohibiting "propaganda" has been interpreted as rendering non-charitable organizations formed to encourage racial tolerance, international understanding and many other causes in which the public benefit is inestimable. A principle that discourages these purposes and leaves numerous deserving organizations outside the pale of charity, but results in the subsidization of countless frivolous purposes on the grounds of public policy, must be suspect.

A common objection to doing away with the prohibition on charities engaging on or spreading "propaganda" is that it might result in the government subsidizing views and opinions that are widely regarded as repugnant. However, presumably this can be controlled by a general prohibition that the views expressed cannot, naturally, be illegal (such as hate propaganda) or against public policy.

PART VII ARGUMENTS AGAINST ALLOWING CHARITIES TO ENGAGE IN POLITICAL ACTIVITIES

The arguments that have been made as to why charities should be prohibited from engaging in political activities have been dealt with explicitly and implicitly in much of the discussion above. However, five of the main arguments will be briefly reviewed:

A Political activities are not embraced within the traditional justification for subsidizing the voluntary sector;

B The prohibition against political activities is necessary to prevent charities from pursuing the self-interest of their members and supporting political parties;

C If charities were allowed to engage in political activities lobbying activities would increase dramatically;

D The government would be put in the position of supporting some political activities that many persons consider reprehensible; and

E Allowing charities to engage in political activities would not be in the best long-run interest of the voluntary sector.

A Political Activities Are Not Embraced within the Traditional Justification for Subsidizing the Voluntary Sector

As discussed above, the traditional justification given for subsidizing charities has been that they provide public goods and services that would otherwise be provided by the state. Subsidizing organizations in the voluntary sector which provide these services promotes the values of pluralism. A quite different justification, which is discussed in Chapter 4 of this paper, is normally given for subsidizing citizen interest groups. Thus, suggesting that charities should be allowed to engage in an unlimited amount of political activities confuses the function of charities with that of public interest lobbying groups.

It is true that one could argue that the role of the voluntary sector has changed, and that in the modern welfare state it has a more viable role in lobbying government than in providing public goods and services. However, if that is the case then the form of government subsidization might require rethinking. It is not clear the same form of subsidization ought to be given to essentially public citizen interest groups as is given to traditional charities. This is discussed at greater length in Chapter 4 of this paper.

B The Prohibition against Political Activities Is Necessary to Prevent Charities from Pursuing the Self-Interest of Their Members and Supporting Political Parties

Concern over two potential areas of abuse appear to underline the American legislation regulating the political activities of charities, and also appear to have concerned the courts in formulating rules in this area. First, charitable status is founded upon the notion of public benefit. Specific individuals often benefit from certain kinds of legislative reforms, particularly at the provincial and local levels of government. If charities are allowed to engage in political activities it will be very difficult to prevent them from lobbying for legislative changes that are only of immediate benefit to their members.

Secondly, for the reasons mentioned earlier, charities should be prevented from engaging in partisan politics. However, often particular issues become identified with particular political parties. If charities were allowed to engage in political activities it would be difficult to police the borderline between the pursuit of charitable objects and political campaigning for the party of a particular candidate.

Admittedly, the prohibition on political activities is an overly broad means of preventing these two abuses. However, it is unclear that a less restrictive borderline could be maintained.

C If Charities Were Allowed to Engage in Political Activities Lobbying Activities Would Increase Dramatically

If charities were allowed to engage in an unlimited amount of political activities, the aggregate amount of lobbying activities might increase substantially and government revenues would be affected. The budgets of large charities are enormous, and if they made the judgment that they could best achieve their objectives through lobbying the political process could be deluged with lobbying activities. Also, if establishing a charitable organization became a recognized technique for deducting personal-choice lobbying expenses, in effect, many new such charities might be formed, resulting in a substantial loss of revenue or the attraction of funds away from more traditional charities.

This argument rests upon two assumptions. First, that increased lobbying activity would not be helpful or increase the legitimacy of government. Second, that if charities were allowed to engage in political activities their lobbying efforts would increase significantly. Neither of these assumptions are obvious.

D The Government Would Be Put in the Position of Supporting Some Political Activities that Many Persons Consider Reprehensible

If charities were allowed to engage in political activities some organizations whose political views would be reprehensible to the majority of Canadians would undoubtedly attempt to register as charities. However, this should not be seen as a significant

problem. The expression of diverse views would of course be the purpose of allowing charities to engage in political activities. Furthermore, the expression of views that were deemed to be against public policy, such as hate propaganda, could be specifically prohibited.

E Allowing Charities to Engage in Political Activities Would Not Be in the Best Long-Run Interest of the Voluntary Sector

It is not clear that permitting charities to engage in an unlimited amount of political activities is in the long-term interest of the voluntary sector. If charities are involved in extensive lobbying, and if they are seen frequently advocating or in other ways urging the public on emotional grounds to support certain political activity, there is a risk that public propagandizing on one side of an issue, for example, may be perceived by the public as inconsistent with the concept of charity. Many people undoubtedly feel that it is appropriate to the nature of charities to restrict them to non-partisan activities. Most seriously, if churches and other charities are seen as taking an increasingly active political role on contentious issues, many people, particularly those with opposing views, might begin to question state subsidization of the voluntary sector.

In addition to a potential dimunition of _____ for the charitable sector, an unrestricted right to engage in political activities might in the long-run threaten the independence of the voluntary sector. Much lobbying would undoubtedly be directed at simply increased government subsidies. Fewer and fewer private funds would be spent on direct charitable activities.

Finally, political activities will entangle charities more in the political process. One result of this, to the extent that it causes confusion about the overlapping roles of charity and government, might be to dilute the philanthropic impulse in individual donors. If charities are seen arguing for an increased government role in virtually every area of social concern the need for the traditional voluntary sector might be called into question.

PART VIII REFORMING STANDARDS FOR THE PERMISSIBLE CONDUCT OF THE POLITICAL ACTIVITIES OF CHARITIES

A number of reasons have been suggested above as to why charities ought to be able to engage in activities that might be broadly defined as political. On the other hand, reasons have been suggested immediately above as to why they should not be allowed to engage in an unlimited amount of political activities. This third alternative solution to the political activities conundrum involves defining a permissible but limited amount of political activities that they can engage in.

Two general approaches can be taken. First, general guidelines defining the amount of permissible political activities might be promulgated. Second, detailed and precise rules limiting their political activities might be formulated. The guidelines formulated by the English Charity Commissioners are an example of more general guidelines. The United States Internal Revenue Code regulations dealing with the political activities of charities are an example of detailed rules.

Any choice along the specificity-generality continuum will generate a unique set of costs and benefits. However, in this area a strong case can be made for detailed rules. First, because of the political nature of the issue, in many situations it would be difficult for Revenue Canada to enforce broad standards. For example, it would be hard to imagine Revenue Canada threatening a major religion with deregistration pursuant to a broad obviously somewhat discretionary standard. Second, if broad standards are used, invariably charges will be made that Revenue Canada has subjectively and discriminatorily enforced the restriction to supress the views or organizations with which they disagree. Whether or not these allegations are well founded, such discretion and the resulting potential for actual or apparent abuse are undesirable as a matter of sound tax administration. Third, because the purpose of a general guideline in this area would be to simply refer to an arbitrary amount of political activities that charities area allowed to engage in, courts could not engage in reasoned elaboration in reaching decisions in individual cases. The law is replete with standards such as 'good faith,' 'due care,' and 'reasonableness.' The application of these standards require judges both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in that standard. But where the law is simply trying to define an arbitrary cut-off point, standards used to define this point cannot provide judges with premises from which the solution to individual cases can be consistently deduced. Fourth, a broad standard will invariably require selective enforcement. One result of such selective enforcement is that an organization which has taken a stand on a legislative issue, and which encounters opposition strong enough to require vigorous advocacy of its own point of view, runs a greater risk of being investigated than an organization which is involved in a legislative issue of a less controversial nature. Thus political activity might be discouraged at the very point where it is most needed. That is to say, broad standards would have a chilling effect on the political activities of some charities.

It is important to note that if the rules are to be seriously enforced, the choice of whether to enact a standard or a set of precise rules is implicitly a choice between legislative or judicial lawmaking. A general legislative standard would create a demand for specification. If the guidelines are enforced this demand would be brought to bear on the courts and they would have to respond by creating rules particularizing the legislative decision to enact a standard requires consideration of the differences in costs and benefits between legislative rules and judge-made rules (precedents). In the area, the method of the common law, analogy and precendents, would not provide sufficiently clear guidelines for decision making by charities.

If case-by-case evaluations are to be eliminated, the rules must obviously be detailed and thus render the Act more complex. The costs of the complexity can be reduced by putting a broad standard in the Act and then relegating the detailed rules to regulation. However, it is important to note that while the rules become more complex, they also become simpler to follow and easier to enforce. Also, complexity in this area is inevitable if the law is enforced. Complexity in the Act in many cases evolves along a predictable pattern. Parliament adds to the tax statute a simple provision embodying subjective standards and requiring case-by-case determination. These provisions prove difficult to apply and engender uncertainty in the administration of the tax law. Parliament thus eventually replaces or augments the initial provision with more detailed objective provisions which add to the complexity of the Act, but which are easier to enforce. Whether this pattern is followed depends upon the pressure for consistent enforcement.

On the other hand, for the reasons given in the introduction to this chapter, perhaps this is an area where "muddling through" represents the most viable policy choice; therefore, broad guidelines will do. The costs of an elaborate, detailed and complex legal regime is not warranted. Most charities will respect the intend of the broad guidelines and any problems can be fairly resolved through mutual accommodation between a particular charity and Revenue Canada.

FOOTNOTES

1. See, most recently, "Morrison, Redefining Charities in the Income Tax Act," (1982-83) The Philanthropist 10; Intven, "Political Activity and Charitable Organizations," (1982-83) The Philanthropist 35.

2. People in Action (Ottawa: Minister of Supply and Services, 1980), p. 234.

3. For examples, see infra Part I: Background.

4. Charity Law and Voluntary Organization (Goodman Report) (London: Bedford Square Press, 1976), p. 41.

5. Revenue Canada, Information Circular No. 78-3, February 27, 1978; Registered Charities: Political Objects and Activities. The Information Circular is reproduced in A.B.C. Drache, Canadian Tax Treatment of Charities and Charitable Donations, 2nd ed. (Toronto: Richard De Boo, 1980), p. 171 and Drache, "Political Activities: A Charitable Dilemma," 2 The Philanthropist 21, 24-26 (1980).

6. Id., para. 4(a).

7. Id., para. 5.

8. Id., para. 6.

9. See H. of C., Debates, May 10, 1976, p. 13328; May 14, 1976, p. 13517; June 14, 1976, p. 14457.

10. See H. of C., Debates, May 1, 1978, p. 5001, per Hon. Allan J. MacEachen; H. of C., Debates, May 3, 1978, p. 5118 and May 5, p. 5188 per Miss Bégin.

11. H. of C., Debates, May 1, 1978, p. 5002, per Mr. MacDonald (Egmont).

12. See H. of C., Debates, May 2, 1978, p. 5056-7.

13. H. of C., Debates, May 3, 1978, p. 5116, per Miss Flora MacDonald (Kingston and the Islands).

14. Senate, Debates, May 3, 1978, pp. 7728 ff.

15. Senate, Debates, May 4, 1978, p. 744. See also, Senate, Debates, May 10, 1978, p. 755.

16. H. of C., Standing Committee on Finance, Trade and Economic Affairs, Proceedings, Issue No. 35, May 17, 1978, p. 35:6. See also a statement by Miss Bégin in the House of Commons, Debates, May 3, 1978, p. 5119.

17. See H. of C., Debates, May 5, 1978, p. 5188-89; May 19, 1978, p. 5588.

18. H. of C., Debates, December 11, 1978, p. 2009, per Mr. David MacDonald (Egmont).

19. H. of C., Debates, December 11, 1978, p. 2013, per Mr. Munroe (Esquimalt-Saanich). In noting that the law stated in the circular was still being enforced Miss Flora MacDonald (Kingston and the Islands) recounted the situation of the Brampton Women's Centre. In the spring of 1978 in order to become registered under the Income Tax Act, they apparently had to sign a statement that they would take no part in political activities, H. of C., Debates, December 11, 1978, pp. 2014-15.

20. The debates in the House were widely reportd. See, for example, "Opposition charges church 'intimidation'," Montreal Star, May 2, 1978, p. A1; "Political rule aimed at scaring churches, Tory MPs suggest," Globe and Mail, May 2, 1978; "Trudeau reaffirms charity tax policy," Montreal Star, May 3, 1978, p. A16; "Political role by charities is illegal, Trudeau explains," Globe and Mail, May 3, 1978; "Charities tax-free status not threatened by politics," Vancouver Sun, may 4, 1978, p. A3; "PM suspends policy of gagging charities," Toronto Star, May 2, 1978; "Taxmen told to lay off on warning churches," Montreal Gazette, May 4, 1978; "Assault on Charity," Winnipeg Free Press, May 6, 1978, p. 37.

21. See "Stay out of politics Ottawa tells charity," Totonto Star, April 16, 1978, p. A3.

22. Frank Howard, "Bureaucrats," Ottawa Citizen, April 27, 1978, see also May 8, 1978.

23. Toronto Star, April 18, 1978, p. A8.

24. Toronto Star, April 27, 1978, p. A8. See also, "Let charities speak out freely," Toronto Star, April 29, 1978, p. A8. "Ottawa sees the light over charity rights," Toronto Star, May 4, 1978, p. A8 ("A definition pertinent to today must surely recognize that the role of a voluntary association goes beyond distributing food baskets to the poor and includes efforts to change public policy to alleviate poverty, help the handicapped or achieve other social reforms.")

25. Globe and Mail, May 8, 1978, p. 6. It should be noted that not everyone attached the information circular. In a letter to the editor of the Ottawa Journal a reader exclaimed, among other things:

> Sirs: A Revenue Canada circular dealing with the political activities of non-taxable contributions to institutions, churches, universities, etc., has been withdrawn by a storm of protest from the people the state is attempting to protect the taxpayer from: noisy, self arrogated sycophants, all the way from Oxfam, the World Council of Churches, down to the ragtag bobtailed assortment of smaller fry.
>
> ...
>
> The duty of the university is to promote the better understanding of man; the church for the carrying out of Christ's Sermon on the Mount; but the sum total of their political causes have the effects of intolerance and hatred. And for this they should use the monies of the innocents, with no mandate, with all the trappings of an authoritarian cabal:

Letter from James A. Flux, Ottawa Journal, May 23, 1978.

26. See "Tax row back to court," Toronto Star, May 3, 1981; "Charity status given moral campaigners opposed by women," Winnipeg Free Press, September 24, 1981; "Tax men threaten to muzzle churches," Vancouver Sum, May 11, 1981; "Taxman has lost faith in Christian charity," Toronto Sun, May 5, 1981.

27. See "Renaissance International," (1982-83) The Philanthropist 53.

28. Letter from Mrs. Betty B. Wardle, Chief, Charitable and Non-Profit Organizations Section, Department of National Revenue, Taxation to the lawyers for Manitoba Foundation for Canadian Studies, February 5, 1980, reproduced as an appendix to Intven "Political Activity and Charitable Organizations," (1982-83) The Philanthropist 35, 48.

29. See "Mag charges censorship as feds chop charity," Toronto Clarion, March 19-April 1, 1980, p. 1.

30. For a brief description of the issue in the Canadian Dimension case see Drache, "Political Activities: A Charitable Dilemma," 2 The Philanthropist (No. 4) 21 (1980).

31. See Pitts, "Charities fight for right to lobby," Financial Post, May 16, 1981; "Politics in church: Upcoming trial to decide tax status," Calgary Herald, August 15, 1981.

32. "Define role of charities," Toronto Star, February 8, 1981, p. A8.

33. (1917) A.C. 406 (H.L.).

34. Id., p. 442.

35. See, for example, Re Patriotic Acre Fund, (1951) 2 D.L.R. 624, 634 (Sask. C.A.), per Martin C.J.S.; National Anti-Vivisection Society v. Inland Revenue Commissioners, (1948) A.C. 31 (H.L.).

36. Lord Porter commented in 1948 that "it is curious how scanty the authority is for the proposition that political objects are not charitable ... " National Anti-Vivisection Society v. Inland Revenue Commissioners, (1948) A.C. 31, 54. In the same case, Simonds L.J. also reflected on the "paucity of judicial authority on this point ... But in truth the reason of the thing appears to me so clear that I neither expect nor require much authority." Id., p. 63.

37. See generally, O.D. Tudor, The Law of Charitable Trusts 2nd ed. (London: Butterworths, 1987), ch. 2; C.E. Crowther, Religious Trusts (Oxford: George Ronald, 1954).

38. Tudor, supra note 5, p. 19 (footnote omitted).

39. Id., p. 20.

40. (1828) 5 Russ. 288; 38 E.R. 1035.

41. Id., p. 292, E.R. p. 1037.

42. See, F.M. Whiteford, The Law Relating to Charities (London: Stevens and Haynes, 1878), p. 26 ("(The gift in De Themmines) would now be held valid."). But see T. Jarman, A Treatise on Wills, 4th ed. by S. Vincent (London: Henry Sweet, 1881), p. 208 ("(in Themmines v. De Bonneval) Sir J. Leach rested his decision entirely on the ground that to allow such a publication was against public policy."); L.S. Bristowe, C.A. Hunt and H.G. Burdett, Tudor's Charitable Trusts, 4th ed. (London: Sweet and Maxwell, 1906), p. 45 ("A gift for the publication of a treatise inculcating the doctrine of papal supremacy, which was held void in De Themmines v. De Bonneval, would, it is apprehended still to be bad.")

43. (1851) 4 De G. & Sm. 467; 64 E.R. 916.

44. Id.

45. Thornton v. Howe (1862), 31 B. 14; 54 E.R. 1042.

46. Farewell v. Farewell (1892), 22 O.R. 573 (Ont. Ch. Div.).

47. Re Foveaux, (1895), 2 Ch. 501.

48. Re Villers-Wilkes (1895), 72 L.T. 323.

49. Russell v. Jackson (1852), 10 Hare 204; 68 E.R. 900.

50. Re Scowcroft, (1898), 2 Ch. 638.

51. Lewis v. Doerle (1891), 25 O.A.R. 206 (Ont. C.A.).

52. L.S. Bristowe, C.A. Hunt and H.G. Burdett, Tudor's Charitable Trusts, 4th ed. (London: Sweet and Maxwell, 1906), p. 61.

53. See supra note 40.

54. See supra note 43.

55. See T. Jarman, A Treatise on Wills, 4th ed. by S. Vincent (London: Sweet and Maxwell, 1881), vol. 1, pp. 207-08; F.M. Whiteford, The Law Relating to Charities (London: Stevens and Haynes, 1878), pp. 23, 26: F.A.P. Hamilton, The Law Relating to Charities in Ireland (Dublin: Robert C. Gerrard, 1879), pp. 27-28.

56. A.D. Tyssen, The Law of Charitable Bequests (London: William Clowes and Sons, 1888).

57. Id., pp. 176-77.

58. Id., p. 177.

59. Sheridan, "Charitable Causes, Political Causes and Involvement," 2 The Philanthropist 5, 12 (1980).

60. A.D. Tyssen, The Law of Charitable Bequests 2nd ed. by C.E. Shebbeare and C.P. Sanger (London: Sweet and Maxwell, 1921), see ch. IX.

61. (1892), 22 O.R. 573 (Ont. Ch. Div.).

62. Id., p. 574.

63. Id., p. 580.

64. Id., pp. 580-81.

65. Id., pp. 581-82.

66. (1895) 2 Ch. 501 (Ch. Div.).

67. Id., p. 504.

68. Id., p. 507.

69. (1917) A.C. 406 (H.L.).

70. See supra note 40.

71. Supra note 69, p. 442.

72. Supra note 69, p. 442.

73. See Tudor on Charities, 5th ed. by H.G. Carter and F.M. Crawshaw (London: Sweet and Maxwell, 1929), p. 41-42; T. Jarman, A Treatise on Wills, 7th ed. by C.P. Sanger (London: Sweet and Maxwell, 1930), p. 194.

74. See case comments in 33 Law Quarterly Review 300 (1917); 31 Harvard Law Review 289 (1918).

75. Re Tetly: National Provincial and Union Bank of England Ltd. v. Tetly (1923) Ch. 258, p. 262 (C.A.). (In dicta at Chancery, Mr. Justice Russell said "Subsidising a newspaper for the promotion of particular political or fiscal opinions would be a patriotic purpose in the eyes of those who consider that the triumph of those opinions would be beneficial to the community. It would not be an application of funds for a charitable purpose." The judge then quoted Lord Parker in Bowman, supra note 69); C.I.R. v. Temperance Council of the Christian Churches of England and Wales (1926), 136 L.T. 27, 28 (K.B.) (Rowlatt J. asserted, without citation of authority, "this is mainly a trust to secure a certain line of legislation relating to temperance reform and if that is so, I do not understand it to be disputed that that would not be a charitable trust."); C.I.R. v. Yorkshire Agricultural Society, (1928) IK.B. 611, 632 (C.A.). (The political purposes of the society were found to be ancillary to its main charitable purposes, therefore, its charitable status was upheld on this ground; however, Atkin L.J. stated, again without citation of authority, "I can imagine that a society which was formed solely for the purpose of watching and advising on legislation affecting agriculture would not be a

society formed for a charitable purpose."); In Re Jone - Public Trustee v. Soul of Darendon (1929), 14 L.T.R. 259, 260 (A gift "to the Premiere League of the Conservative Cause" was held not to be charitable, apparently because of its political nature, no authorities were cited.); In re Hood, (1931) Ch. 240 (C.A.) (The purpose of the testator's gift in this case was to assist "in spreading Christian principle ... and in aiding all active steps to minimize the drink traffic." The Court of Appeal held that the gift was charitable since the main object was the advancement of religion.) Bonar Law Memorial Trust v. I.R.C. (1933), 46 L.T.R. 220 (K.B.) (A gift of a mansion house to be used as an educational centre for the Conservative Party was held not to be charitable.)

76. (1948 A.C. 31 (H.L.).

77. See In Re Strakosch, (1949) Ch. 529, 538 (C.A.) (A gift for a fund "to strengthen the bonds of unity between the Union of South Africa and Northern Country and which incidentally will conduce to the appeasement of racial feeling between the Dutch and English speaking sections of the South Africa community" held not to be charitable: "The problem of appeasing racial feeling within the community is a political problem ... "); Re Hopkinson, (1949) 1 All E.R. 347, 350 (Ch. Div.) (A gift "for the advancement of adult education ... on the lines of the Labour Party's memorandum headed "A Note on Education in the Labour Party" was held not charitable. Vaisey J. stated: "The principle that legitimate and proper political aims and ambitions are not charitable is far too well settled for me at this stage to attempt to depart from or refine upon it."); Animal Defence and Anti-Vivisection v. I.R.C. (1950), 66 L.T.R. 1091 (Ch. Div.) (Even though the society's object of opposing vivisection might be educational, on the evidence one object of this society was to obtain the repeal of the Cruelty to Animal Act, 1876; therefore, its purpose was political not charitable.); In Re The Trusts of The Authur McDonald Fund, (1957) 1 W.R.L. 81, 86 (Ch. Div.) (It was alleged that when "the history and the surrounding circumstance are taken into account, it is clear that the dominant purpose was ... to further the political objects of the society." However, the court held on a proper construction the purpose was the advancement of education.); In Re Jenkins' Will Trusts, (1966) 1 ch. 249, 255 ("the promoting of the passing of an Act of Parliament prohibiting vivisection, is not charitable not only on the ground that it is a political object but also that the ultimate object to be achieved by the Act of Parliament is one which in itself is not recognized by the law as being a charitable purpose."); Baldy v. Ferntuck, (1972) 1 W.R.L. 552, 558 (Ch. Div.) (A

gift to a political campaign of protest against the Government's policy of ending free milk supplies to school children was held to be a political purpose and therefore not charitable."); In Re Bushnell, (1975) 1 W.L.R. 1596 (Ch. Div.) (A trust "for the advancement and propagation of the teaching of socialized medicine" was held to be for a political purpose.); McGovern v. Attorney-General (1981) 3 All E.R. 493 (Ch. Div.) (The objects of Amnesty International, including the relief of prisoners of conscience and attempting to secure their release, was held to be political since, among other things, it involved attempting to change the laws of foreign countries.)

78. Farewell v. Farewell (1982), 22 O.R. 573 (Ch. Div.).

79. Lewis v. Doerle (1898), 25 O.A.R. 206 (Ont. C.A.).

80. Re Gwynne (1912); 5 D.L.R. 713 (Ont. H.C.).

81. See supra note 69.

82. Re Knight, (1937) 2 D.L.R. 285, 288 (Ont. S.C.).

83.

84. See also Re Loney (1953), 4 D.L.R. 539 (Man. Q.B.) (A gift "for the purposes of promoting and propagating the doctrines and teaching of socialism" was held not charitable.)

85. (1951), 2 D.L.R. 624, 636 (Sask. C.A.).

86. (1975), 64 D.L.R. (20) 531 (Sask. C.A.).

87. (1981) 3 All E.R. 493 (Ch. Div.).

88. Id., p. 501.

89. Id., p. 514.

90. (1950), 66 T.L.R. 1091 (Ch.).

91. Id.

92. Id. 1095-96.

93. (1928) 1 K.B. 611 (C.A.).

94. Id., p. 632.

95. Supra note 76.

96. Id., p. 61. See also p. 51 per Wright L.J.; p. 56 per Porter L.J., p. 76 per Normand L.J.

97. (1931) 1 Ch. 240 (C.A.).

98. Id., p. 241.

99. Id., p. 252.

100. Supra note 87.

101. Id., p. 509.

102. See also Re Inman (1965) V.R. 238, 242, (S.C. of Victoria) per Gowans J., (The general object is, therefore, to prevent cruelty to animals. This dominates the statement of objects ... None of the methods set out for the achievement of this object detracts from its character. It is true that one of those methods, viz. procuring such further legislation as may be though expedient, if taken alone, would be a political object and nothing more. But it is only a method of achieving the main or fundamental object, the prevention of cruelty to animals.") See generally, Sheridan, "Waiting for Goodman," 5 Anglo-American Law Review 153, 159-60 (1076).

103. See Drache, "Political Activities: A Charitable Dilemma," 2 The Philanthropist (No. 4) 21 (1980).

104. Para. 194.1(1)(b).

105. Para. 149.1(1)(a).

106. I.C. 78-3, February 7, 1978. Reproduced in A.B.C. Drache, Canadian Tax Treatment of Charities and Charitable Donations 2nd ed. (Toronto: Richard De Boo, 1980), p. 171-75.

107. For the story see above.

108. Supra note 106, para. 2(b) and 3(a).

109. Supra note 106, para. 2(b).

110. Re Patriotic Acre Funds (1951) 2 D.L.R. 627, 634 (Sask. C.A.).

111. See generally, a series of articles by Sheridan: "Charity v. Politics," Anglo-American Law Review 47 (1973), "The Political Muddle - A Charitable View?" 19 Mal. L. Rev. 42 (1977), "The Charpol Family Quiz," 2 The Philanthropist, 14 (1977) "Charitable Causes, Political Causes and Involvement," 2 The Philanthropist 5 (1980). See also M. Chesterman,

Charities, Trusts and Social Welfare (London: Weidenfeld and Nicolson), pp. 181-88; B. Nightingale, Charities (London: Allen Lane, 1974), ch. 2; D.W.M. Waters, Law of Trusts in Canada (Toronto: Carswell, 1974) pp. 494-97. See further the textbooks referred to in footnote , Part I of this paper.

112. (1948) A.C. 31 (H.T.). Commented on in 63 Law Quarterly Review 22 (1948), 204 Law Times 154 (1947), 11 Modern Law Review 223 (1948), 12 The Conveyancer and Property Lawyer 63 (1947).

113. See generally the case referred to supra notes 38 to 40.

114. Tyssen, supra note 21, p. 177.

115. Quoted with approval by Lord Simonds in National Anti-Vivisection Case (1948) A.C. 31 (H.L.); see also Re Shaw (1947) 1 All E.R. 745.

116. H.G. Hanbury, Modern Equity 6th ed. (London: Stevens, 1952) 6th ed., p. 228.

117. (1917) A.C. 406.

118. Id., 552.

119. See supra notes 56-60.

120. The following quotations is illustrative:

> ... the expression 'charitable purpose' ... has certainly not been applied to any purpose which has a predominantly political favor. To hold otherwise would impose upon the courts of law the impossible duty of being required to decide whether or not a certain line of political action was beneficial to the community.

Trustees for the Roll of Voluntary Workers v. Commissioners of Inland Revenue, (1942) Scottish 47, 55, per Lord Fleming.

121. See National Anti-Vivisection Society v. Inland Revenue Commissioners, (1948) A.C. 21 (H.L.), per Lord Simmonds at 61-62 and per Lord Wright at 49-50, quoting at length both Lord Parker and Tyssen on Charitable Bequests; McGovern v. Attorney-General, (1981) 3 All E.R. (Ch. Div.) 493, 504.

122. See Farewell v. Farewell (1892), 22 O.R. 573, per Boyd C.

123. See, for example, In re Murphey's Estate, 62 P. 2d 374, 375 (1936, Cal. S.C.).

124. See supra note 121.

125. Sheridan "Charitable Courses, Political Causes and Investments," The Philanthropist 5, 12 (1980).

126. Cotterell, "Charity and Politics," 38 Modern Law Review 471, 474 (1975).

127. G.G. Bogert and G.T. Bogert, The Law of Trusts and Trustees 2nd ed. (St. Paul, Minn.: West Publishing Co., 1964), sec. 378, pp. 182-83.

128. Supra note 121, pp. 62-63.

129. Annotation, "Validity of Charitable Trust to promote Change in Laws or Systems or Methods of Government," 22 A.L.R. (3d) 886, 888.

130. McGovern v. Attorney-General, (1981), 3 All E.R. 493, 506, per Slade J.).

131. Re Patriotic Acre Fund, (1951) 2 D.L.R. 624.

132. Re Co-operative College of Canada and Saskatchewan Human Rights Commission (1975), 64 D.L.R. (3d) 531.

133. The prohibition on the political activities of charities in the United States was apparently imposed largely out of a concern for preventing the subsidization of self-interested lobbying. See below.

134. Supra note 121, p. 52.

135. It is in regard to controversial issues, Professor Sacks continues, that charities play their most crucial role:

> The role of philanthropy in competing with, supplementing, and even displacing government is particularly significant where controversy abounds. It is here that we have special need for the initiative to create and spread ideas and the diversity of outlook and method that come from the many centers of creative thought and experimentation, free from the uniformity that is often subtly transformed into conformity by the atmosphere of governmental responsibility.

Sacks, "The Role of Philanthropy: An Institutional View," 46 Virginia L. Rev. 516, 531 (1960).

136. (1929), 45 T.L.R. 259 (Ch. Div.).

137. Id., p. 260.

138. (1949) 1 All E.R. 346 (Ch. Div.).

139. Id., p. 352.

140. (1933), 49 T.L.R. 220 (K.B.).

141. Re Loney (1953) 4 D.L.R. 539.

142. (1898) 2 Ch. 638 (Ch. Div.).

143. Id., p. 641-2.

144. (1957) 1 W.L.R. 81 (Ch. Div.).

145. Id., p. 90.

147. McGovern v. A.G. (1981) 3 All E.R. 493. 507 (Ch. Div.).

148. In the U.S. trusts to promote the success of particular political parties are generally regarded as not charitable. See Annotation, Validity and Construction of Testamentary Gift to Political Party, 41 A.L.R. (3d) 833 (1966).

149. (1949) Ch. 529.

150. Anglo-Swedish Society v. I.R.C. (1931), 147 T.L.R. 295 (The trust was not charitable because it "was a trust to promote an attitude of mind, a view of one nation by another," p. , per Rowlatt J.).

151. McGovern v. A.G., (1981) 3 All E.R. 493 (Ch. Div.).

152. Id., p. 507.

153. Id.

154. Id. He cited Halbury v. Vardon (1851), 4 De G.S. Sm. 467, 64 E.R. 916, discussed supra vol. 11.

155. This statement of the present law is beyond dispute. However, as a matter of interest, the authors of the article on "charities" in the most recent edition of Halbury's Laws of England 4th (London: Butterworths, 1974), vol. 5, par. 543,

state: "The promulgation of particular doctrines or principles not subversive of morality or otherwise pernicious, and not in furtherance of the principles of a particular politcal party, nor involving pressure on the legislature to achieve a political object in changing the law of the land, may be charitable." (Footnotes omitted.) They go on to say "The question whether the promulgation of a particular doctrine or principle will or may benefit the public must be answered by the court for forming an opinion upon the evidence before it." (Footnote omitted.) This statement of law has been carried over almost verbatim from the first edition of Halsbury, except for the qualifications. See Halsbury, The Laws of England (London: Butterworths, 1908), vol. 4, para. 182. In 1908 it was an accurate statement of the law, it no longer is.

156. (1949) 1 All E.R. 346 (Ch. Div.).

157. Id., p. 350.

158. (1949) Ch. 529.

159. Id., p. 538.

160. (1937) 2 D.L.R. 285 (Ont. S.C.).

161. (1975) 1 All E.R. 721; (1975) 1 W.L.R. 1596, 1605 (Ch. Div.).

162. Id., p. 1605.

163. See Annotation, "Validity of Charitable Trust to Promote Change in Laws or Systems or Methods of Government," 22 A.L.R. (3d) 886 (1966); American Law Institute, Restatement of Trusts 20 (St. Paul, Minn.: American Law Institute Pub., 1959) para. 374, comment, p. 260 ("Change in existing law. A trust may be charitable although the accomplishment of the purpose for which the trust is created involves a change in the existing law. If the purpose of the trust is to bring about changes in the law by illegal means, such as by revolution, bribery, illegal lobbying or bringing improper pressure to bear upon members of the legislature, the purpose is illegal. See 377. The mere fact, however, that the purpose is to bring about a change in the law, whether indirectly through the education of the electors so as to bring about a public sentiment in favor of the change, or through proper influences brought to bear upon the legislators, does not prevent the purpose from being legal and charitable."); G.G. Bogert, The Law Trusts and Trustees, 2d ed. (St. Paul, Minn.: West Publishing Co. 1964), vol. 4 para. 378, p. 181 ("Many American decisions and, it is submitted, the better

reasoned cases, declare that trusts which seek to bring out better government by changing laws or constitutional provisions are charitable, so long as the settlor directed that the reforms should be accomplished peaceably, by the established constitutional means, and not by war, riot, or revolution.") A.W. Scott, Trusts, 2d ed. (Boston: Little, Brown and Co., 1956) para. 374.4 p. 2677 ("In the United States the notion that a trust for a purpose otherwise charitable is not charitable if the accomplishment of its purposes involves a change in existing laws has been pretty thoroughly rejected. Many reforms can be accomplished only by a change in the law, and there seems to be no good reason why the mere fact that they can be accomplished only through legislation should prevent them from being valid charitable purposes.")

164. See supra note 117.

165. See Friedland, "Pressure Groups and the Development of the Criminal Law, "in P.R. Glasebrook, ed. Reshaping the Criminal Law (London: Stevens, 1978) 202, 238 ("The reason for the change of approach was undoubtedly the introduction in Canada, and the immense expansion in England, of the income tax system during the First World War and the effect that a charitable designation would have on their, and their supporters, liability for tax.")

166. Supra note 121, p. 225.

167. Armstrong v. Reeves (1890), 25 L.R. Ir. 325, 339.

168. Re Foveaux, (1895) 2 ch. 501.

169. Re Gynne, (1912) 5 D.L.R. 713 (Ont. H.C.).

170. Supra vol. 121.

171. Farewell v. Farewell (1892), 22 O.R. 573, 579.

172. C.I.R. v. Temperance Council of the Christian Churches of England and Wales (1926), 136 L.T. 27, 28 (K.B.).

173. The description in the text is drawn from the following: Borod, "Lobbying for the Public Interest - Federal Tax Policy and Administration," 42 New York University Law Review 1087 (1967); Caplin and Timbie, "Legislative Activities of Public Charities," 39 Law and Contempory Problems 183 (1975); Clark, "The Limitation on Political Activities: A Discordant Note in the Law of Charities," 46 Virginia Law Review 439 (1960); Clark, "The Sierra Club, Political Activity, and Tax Exempt Charitable Status," 55 Georgetown Law Journal 1128 (1967); De Meter and Yochum, "Lobbying By Section 501(c)(3) Organizations Under the Tax Reform Act of 1976: A Proposal for

Change," 30 Tax Lawyer 214 (1976); Dragna, "Environmental Organizations and Legislative Activity Restrictions: The 'Substantial' Deterrent to Environmental Protection," 9 Natural Resources Lawyer 673 (1976); Fogel, "To the I.R.S., 'Tis Better to Give and to Lobby," 61 American Bar Association Journal 960 (1975); Freeman, "The Poor and the Political Process: Equal Access to Lobbying," 6 Harvard Journal on Legislation 369 (1969); Garrett, "Federal Tax Limitations on Political Activities of Public Interest and Educational Organizations," 59 Georgetown Law Journal 561 (1971); Goetz and Brady, "Environmental Policy Formation and the Tax Treatment of Citizen Interest Groups," 39 Law and Contemporary Problems 211 (1975); Hauptman, "Tax Exempt Private Educational Institutions: A Survey of the Prohibition Against Influencing Legislation and Intervening in Political Matters," 37 Brooklyn L. Rev. 107 (1970); R.L. Holbert, Tax Law and Political Access: The Bias of Pluralism Revisited (Beverly Hills: Sage Publications, 1978); Jorling, "Information, the Tax Law and the Legislative Process," 48 Oregon L. Rev. 227 (1969); Liles and Blum, "Development of the Federal Tax Treatment of Charities," 39 Law and Contemporary Problems 6 (1975); "Limitations on Lobbying by Charitable Organizations," an analysis prepared for the Commission on Private Philanthropy and Public Needs, in Research Papers (Washington: Department of the Treasury, 1977) vol. 5, p. 2945; Note, "The Revenue Code and A Charity's Politics," 73 Yale Law Journal 661 (1964); Note, "Regulating the Political Activity of Foundations," 83 Harvard Law Review 1843 (1970); Note, "Political Activity and the Tax Exempt Organizations Before and After the Tax Reform Act of 1969," 38 George Washington Law Review 1114 (1970): Note, "The Tax Code's Differential Treatment of Lobbying Under Section 501(c)(3); A Proposed First Amendment Analysis," 66 Virginia Law Review 1513 (1980); Note, "Lobbying by Section 501(c)(3) Organizations Under the Tax Reform Act of 1976: A Proposal for Change," 20 Tax Law per 214 (1976); Pepper, Hamilton and Sheetz, "Legislative Activities of Charitable Organizations other than Private Foundations, with Addendum on Legislative Activities of Private Foundations," in Commission on Private Philanthropy and Public Needs, Research Papers (Washington: Department of Treasury, 1977), p. 2917; Troyer, "Charities, Law-Making and the Constitution: The Validity of the Restrictions on Influencing Legislation," 31 N.Y.U. Institute of Federal Taxation 1415 (1973); Wachtel, "David Meets Goliath in the Legislative Arena: A Losing Battle for an Equal Charitable Voice?" 9 San Diego Law Review 944 (1972); Walker and Rothermal, "Political Activities and Tax Exempt Organizations Before and After the Tax Reform Act of 1969," 38 Geo. Wash. L. Rev. 1114 (1970).

174. Clark (1960), supra note 1, p. 446, n. 32.

175. 42F. 2d 184 (2d lin. 1930).

176. Id., p. 185.

177. Id., p. 185.

178. Quoted in Holbert, supra note 1, p. 27.

179. See, in particular, Clark (1960), supra note 1, p. 447.

180. All references to statutory divisions in this part of the paper are to the U.S. Internal Revenue Code.

181. Reg. 1.501(c)(3) - 1(c)(3)(ii) to (iv).

182. See supra note 1.

183. See, in particular, Holbert, supra note 1, pp. 31-49.

184. For a review of the constitutional arguments and the major litigation then underway, see Troyer, supra note 1.

185. For a summary of the various legislative proposals made between 1969 and 1976 and a reprinting of the major bills presented to Congress see Pepper, Hamilton and Sheetz, supra note 1.

185.
(a) Section 4945.

186. Hyslop and Ebell, "Public Interest Lobbying and the Tax Reform Act of 1976," 7 Environmental Law 283 (1977); Montgomery, "Lobbying by Public Charities Under the Tax Reform Act of 1976: The New Elective Provisions of Section 501(h) - Safe Harbor or Trap for the Unwary?" 56 Taxes 449 (1978); Nix, "Limitations on the Lobbying of Section 501(c)(3) Organizations - A Choice for the Public Charities," 81 West Virginia Law Review 407 (1978); Shrekgast, "Political Lobbying of Exempt Organizations," 37 New York University Institute on Federal Tax Action, ch. 26 (1978). Washburn, "New Act Defines 'Substantial' Lobbying - But Charities Must Elect to Be Covered," 55 Taxes 291 (1977); Whaley, "Political Activities of Section 501(c)(3) Organizations," (1977) Southern California Tax Institute 195; Weithorn, "'Practitioners' Planning Guide to the New Lobbying Rules for Public Charities," 47 Journal of Taxation 294 (1977).

187. Section 170 provides for the deductibility of contributions to such organizations. It also provides that a contribution made to an organization will not be deductible if the organization is "disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation" or by reason of intervention in a political campaign," Sec. 170(a)(2)(D).

188. See Troyer, supra note 1.

189. Taxation With Representation v. U.S., 585 F. 2d 1219 (4th Cir. 1978).

190. Taxation With Representation of Washington v. Regan, 676 F. 2d 715 (D.C.Cir. 1982).

191 Section 501(c)(19).

192. 544 F. Supp. 471 (1982).

193. The Commission on Private Philanthropy and Public Needs, Giving in America: Forward a Stronger Voluntary Sector (1975), pp. 179-82.

194. See supra note 193. The literature on this concept of the changing role of the voluntary sector in the welfare state is of course voluminous. But for three powerful statements the following research papers prepared for the Filer Commission: Asher 1069, "Public Needs, Public Policy, and Philanthropy: An Analysis of the Basic Issues and Their Treatment by the Commission on Private Philanthropy and Public Needs"; Carry 1110, "Philanthropy and the Powerless"; p. 795 Mavity and Ylvisasher, "Private Philanthropy and Public Affairs." The studies are published in Research Papers (Washington: Department of the Treasury, 1977), pp. 1069, 1110, 795 respectively. See also, People in Action, supra note 2.

195. See generally Lustgarten, "Tax Reductions for Political Advertising: A Footnote to the Referendum," (1977) British Tax Review 337.

196. 358 U.S. 498, 513 (1959).

197. See generally Bostick, "Prop. Regs. on Grassroots Lobbying: Analysis of the Area and Special Problems Involved," Journal of Taxation 332 (1981); Bochm, "Taxes and Politics," 22 Tax Law Review 369 (1967); Cooper, "The Tax Treatment of Business Grassroots Lobbying: Defining and Attaining Public Policy Objectives," 68 Columbia Law Review 801 (1968); Krebs, "Grassroots Lobbying Defined: The Scope of I.R.C. Section

162(e)(2)(B)," Taxes 516 (1978); Note, "Deducting Business Expenses Designed to Influence Governmental Policy as 'Ordinary and Necessary": Cammarano v. United States and a Bit Beyond," 69 Yale L.J. 1917 (1960); Note, "Tax Subsidies for Political Participation," 31 Tax Lawyer 461 ( ); and Weaver "Taxes and Lobbying - The Issue Resolved," George Washington Law Review 938 ( ).

198. M. Chesterman, Charities, Trusts and Social Welfare (London: Weidenfeld and Nicolson, 1979), p. 159.

199. Minutes of Evidence Taken Before the Expenditure Committee, May 12, 1975, p. 312, per Mr. Hamilton.

CHAPTER 3 THE PROCESS OF REGISTRATION

INTRODUCTION

The recognition of an organization as charitable for tax purposes has both a substantive and a procedural dimension. The former raises the issue of the legal definition of charitable objects, and was discussed in chapters 1 and 2. The latter comprises the procedure which must be followed in determining whether an organization has charitable objects. Since so few cases involving the definition of charity are resolved in a court of law, the administrative procedures governing official recognition of a charity are as important as the legal definition itself.

The following background will put the problem of the registration of charities in some perspective.

Revenue Canada receives approximately 3,500 applications for registration a year. A staff of about 35 persons review these applications. The process is conducted relatively informally. Information Circular No. 80-10 sets out what documents a registering charity must file, they include: an application for registration form, financial statements, governing documents and a statement of aims and objectives. Upon receipt of these documents a Revenue officer reviews them and if there are any difficulties with the documentation he or she will get in touch with the registrant by telephone or letter. Many registrants receive assistance from Revenue Canada in properly completing the forms. At present, if there are no difficulties with the applicants registration it will be completed in a matter of weeks. If the forms are not properly completed, or more information is required it can take much longer. On average, it takes three to four months to complete the registration process.

About 12 percent of applications are initially not approved. About two percent of applications are resubmitted and result in registration. The other 10 percent of applications do not result in registration. Most of these cases are ones where the organization is obviously not charitable; for example, it is primarily an athletic club, a fraternal or self-help club, or otherwise an organization designed to benefit primarily its members. A small number are refused registration because their objects are political. Over the past nine years only seven organizations have appealed Revenue Canada's decision not to register them. All of these cases are pending. The two grounds upon which these organizations were denied registration are that their objects were political or that they would provide benefits to their members.

Once a charity is registered there is almost no government oversight of its activities. To maintain its charitable status it will have to expend a certain percentage of its funds on charitable activities and file an annual information return with Revenue Canada.[1] However, the 35 member staff at the tax-exempt organization division of Revenue Canada are able to spend very little of their time monitoring the ongoing activities of registered charities. The supervision or auditing that takes place in the District Offices is at best sporadic. Revenue Canada simply has not been given the resources to monitor the on-going activities of charities.

In contrast to Canada, in England a special government agency, the Charity Commission, exercises relatively close oversight of charities. Its functions go far beyond the registration of charities. In addition to certain quasi-judicial functions, its functions include the general supervision of and assistance to the voluntary sector. However, in discharging its responsibilities it has a staff of over 400, many of whom are legally trained solicitors.[2] Although there is no equivalent to the English Charity Commission in the United States, the Internal Revenue Service's supervision of charities is systematic and it devotes substantially more resources to supervising charities than does Revenue Canada.[3]

The pros and cons of having some form of national commission on philanthropy to undertake regulator functions in relation to charities will not be reviewed here. The point to be made is simply that in recommending the adoption of new legal rules dealing with charities, or in recommending changes in the registration procedures, the very limited administrative apparatus at present in place to deal with the problems must be born in mind.

A number of suggestions have been made from time to time for improving the process of registering and deregistering charities. These suggestions will be reviewed below under headings which suggest the following questions:

A For the purpose of the Income Tax Act, which agency of government should initially determine whether an organization has charitable objects?

B Should an advisory counsel comprised in part of members drawn from the voluntary sector be appointed to advise the government agency responsible for registering charities?

C Would steps such as the following improve the registration process: a system of published rulings, right of registration agency to ask for a statement of the charity's activities, the filing of more comprehensive information returns, and so on?

D If an organization is initially refused registration as a charity what appeal procedure should it be entitled to invoke?

A Initial Determination of Charitable Status

Since many tax provisions concerning charities have a regulatory instead of a revenue collection objective it is not obvious that Revenue Canada should be the principle vehicle for federal oversight of philanthropy. Indeed, five years ago in their report People in Action (which initiated the debate in Canada on the role of the voluntary sector) the National Advisory Council on Voluntary Action to the Government of Canada recommended:

> The responsibilities for registration and de-registration of charitable associations be transferred from Revenue Canada, which is only concerned with the collection of revenue, to the Secretary of State, which has somewhat broader concerns. The department should be authorized and encouraged to take a more flexible view of objects and activities which are for the general good of the community.[4]

There appears to be two distinct recommendations embodied within the National Advisory Council's recommendation. First, that the definition of charity should be broadened. Second, if this is done, the registration process should be transfered to the Secretary of State on the grounds that "because of its mandate, (it) has a broader perspective."[5] Assuming that the definition of charity is to remain unchanged, no reason is given in the report for transferring the registration process from Revenue Canada to the Secretary of State.

However, even if the definition of charity remains unchanged, a number of reasons for transferring the registration functions of Revenue Canada to the Secretary of State or some other agency might be suggested: (1) Since the basic function of Revenue Canada is to collect revenues it is likely to give the registration of charities a low priority; (2) Revenue Canada is unlikely to be staffed with persons who have a legal background or a broad liberal arts background or other people who might be sensitive to the needs of the voluntary sector; and (3) Revenue Canada cannot provide charities with the assistance they need or provide leadership for the improved administration of charities.

Against these suggestions must be weighed the important consideration that the government's oversight of charities must be non-partisan, objective and non-ideological. Revenue Canada's record in this respect appears good. Certain organizational features of Revenue Canada undoubtedly contribute to its relative unsusceptibility to partisan influence. Indeed since Revenue Canada is widely seen as being non-partisan, politically sensitive issues resolved by it are likely to be seen as legitimate. This might not be the case if the registration of charities were undertaken by a more prominent and isolated agency. Also, to the extent that there are delays or charities experience other frustrations in the registration process, given the government's commitment, these problems can likely be dealt with as efficiently by improving Revenue Canada's handling of registration, than by establishing a new agency.

The suggestion for a separate agency to determine registration seems to be derived in part from the experience in England. There the Charity Commissioners, at least initially, register charitable trusts. For tax purposes, their decisions are subject to review by Inland Revenue. However, the Charity Commission is responsible for administering a wide range of regulations over charities. It would be difficult to transfer only a part of its function to a similar commission. Indeed, even within the commission safeguards are taken to ensure that ultimately the administrative decision of whether to register an organization as charitable is made by lawyers.[6]

In most jurisdictions the question of whether an organization is charitable is initially made by revenue officials. And unless some form of national charity commission were to be established, or the definition of charity substantially changed, little might be gained and a considerable amount risked, if the function of registering charities were transferred from Revenue Canada.

B The Appointment of an Advisory Council

To improve this process of registration, some organizations have suggested that an advisory council made up of persons drawn partly from the public service and partly from the voluntary sector should be appointed by the Minister of Revenue.[7] Its function would be to review contentious applications for registration and to examine cases of possible revocation, and then to recommend appropriate action to the minister. The council's recommendations would be only advisory; however, although the minister would not be bound to follow the recommendations of the council, it has been asserted that "refusing to do so would have possible political consequences." The purpose of an advisory council, comprising in part members of the voluntary sector, would be to enable the minister to be more aware of this group's (the voluntary sector's) concerns about the impact of decisions to refuse or revoke registration.

Again, this suggestion was first made by the National Advisory Council on Voluntary Action to the Government of Canada. In their report, People in Action, they recommended that:

> An independent three-person board be created to review rejected applications for registration and revocation of registered status upon the request of either the affected voluntary association or the minister, and to recommend to the minister the proper course for him to take with regard to the registration of the aforementioned voluntary association.[8]

They went on to note that "the board should not be seen as a substitute for any other method of appeal." Instead, its sole purpose was "to apply a new perspective to (registration) questions."

If the issue of what purposes are charitable continues to be regarded as a legal question, it is difficult to see the purpose of such an advisory council. The premise that the definition of charity should be in fact a political question appears to be implicit in the suggestion. That is to say, the recommendation that an advisory council containing social-welfare experts be established to assist Revenue Canada in determining what is a charity appears to confuse two quite different approaches to defining charitable objects. A system of discretionary registration for charities, with maximum regard to, for example, contemporary welfare needs is one approach. Under this approach it would make sense to have a panel of experts assist in determining registration. This specialist tribunal would be formally free from the doctrine of precedent and assisted by guidelines perhaps provided by the Secretary of State. But under this view it is doubtful if the courts should continue to act as ultimate arbiters of charitable status. The courts do make new law and exercise discretion. However, their methodology is presumably much different from that which would be applied by the special tribunal. This larger issue was discussed in Chapter 1 of this paper.

To the extent that the purpose of an advisory council is simply to notify Revenue Canada about the facts relating to novel purposes, more efficient methods might be available. For example, in preparing guidelines or a general ruling on a novel question Revenue Canada might circulate draft proposals for public comment. In this way their own expertise could be supplemented with the views of all interested persons.

C Steps that Could Be Taken to Improve the Registration Process

In addition to the appointment of an advisory council, a number of other suggestions have been made from time to time for improving the process of registering charities. Obviously a fair and efficient registration process is of crucial importance to the vitality of the voluntary unsophisticated (in bureaucratic matters) groups of individuals, and their philanthropic impulse ought not to be stiffled by an insensitive, prolonged or unfair registration process. Below a number of improvements that might be made in the registration process are summarized.

1 Published rulings. The possibility of Revenue publishing its decisions in borderline cases of registration should be explored. These published rulings would of course deal with general factual situations without identifying any particular applicants for recognition. Such rulings would serve as precedents and guidelines for both Revenue officials and applicants. Also published rulings would enable a better assessment to be made of whether Revenue Canada is striking a proper balance between caution and inspiration. It is particularly important that such decisions be published since so much of the law is made at the administrative level in this area. In the United States such rulings are published and in England the Charity Commissioners frequently publish in their annual reports the general guidelines they are following in contentious areas.

2 Statement of activities. One of the difficulties that Revenue Canada now faces in registering new applicants is that often they only have a broad statement of the objects of the organizations in front of them. The following suggestion was made in England in the Goodman Report:

> We think that the Charity Commissioners might consider it to be desirable that they should require, when a new charity is registered, a statement in general terms of how it proposes to achieve its objects. The statement should not be incorporated into its governing instrument and would not therefore prevent it from changing its methods, but if its methods are changed it should file a supplementary statement with the Charity Commissioners which would, within reason, be made available for public inspection. If this proposal is adopted, it will assist the Charity Commissioners to compare the performance of the charity with its statement of intention when it comes to review its activities and, in conjunction with the annual report which, in a later part of this report we suggest would accompany the statements of accounts, will make the surveillance of charities easier.[9]

3 Comprehensive returns. Surprisingly little information is publicly available about the collection and use of charitable funds. Aggregate data are not available about the incidence of spending by charities, nor is sufficient information provided in public returns so that judgments can be made about the work of individual charities. This information is critical. Revenue Canada should perhaps be given more staff and funding so that it can collect and analyze much more information about registered charities.

4 Model purposes. In England, after a review of the charity commission, the expenditure committee made the following recommendation:

> We are not satisfied with the Charities Commissioner's assurances that everything possible is done to avoid unnecessary delays. We consider that their registration procedure can, and should be, speeded up and achieved by a fresh administrative approach within their existing budget provisions. We think it should be feasible for them to produce a variety of model trusts catering for a number of different situations. These models could be widely circulated to all possible interested bodies and persons, such as local authorities, and should include provisions for the alteration of the trust in the event of its becoming out of data.[10]

This recommendation raises the slightly broader issue of whether Revenue Canada is doing enough to explain its procedures to the public. In People in Action the National Advisory Council noted, "Many groups do not know how to apply for charities registration. It may be their first interaction with government or with a legal process. At the moment, such procedures are not adequately spelled out and much is left to ministerial discretion, thus enhancing the subjective nature of process. This information should be distributed as widely as possible."[11] In addition, Revenue Canada might, for example, sponsor seminars and educational programs throughout the country in order to familiarize the public with registration procedures and the responsibilities of register charities.

5 Personnel. It might be that because the registration division is not involved in revenue raising it is ignored to some extent in budgeting within the department. Also since the section does not lead to potentially lucrative post-Revenue opportunities it might be difficult to recruit personnel at the lower levels.

Few, if any personnel in the division are, for example, legally trained. In the United States, by contrast, in order to provide new perspectives, the Technical Office's Exempt Organization Branch deliberately hires people from outside the service. Often new staff members are young lawyers just admitted to the bar. The branch deliberately seeks applicants with a broader liberal arts background or experience than the usual revenue employee. Staff members often have experience with legal aid societies, public defenders, municipal governments, state conservation programs, and other government agencies.

These few suggestions of ways in which the registration process might be improved are intended to be illustrative not definitive. The point is that if the registration process needs improvement much can be done within the existing framework, without taking more drastic steps such as transferring the responsibilities to another agency or appointing an advisory council.

D Appeals from Revenue Canada's Registration Decisions

At present, an organization that has been denied charitable status, or a charity that has had its registration revoked, must appeal directly to the Federal Court of Appeal.[12] An appeal to this high level of court is expensive and time-consuming. The fact that the court has not heard an appeal from Revenue Canada's decisions for the last 10 years is undoubtedly evidence of this fact. The great majority of charities or purported charities simply do not have the resources to instigate such an appeal.

Two suggestions relating to the process of appeal have been made from time to time. First, it has been suggested that some form of administrative appeal from Revenue Canada's initial decision not to register or to deregister a charity should be allowed. Second, instead of an appeal directly to the Federal Court of Appeal, an appeal to the Federal Court, Trial Division should be provided under the Act. These suggestions might be viewed as alternative suggestions or both might be implemented.

Before reviewing these alternatives, it might be noted that a recent case has made reform in this area imperative. In Renaissance International v. M.N.R.[13], the appeal procedure followed at present was held to deny the registrant natural justice. Renaissance International, a fundamentalist religious organization and a registered charity, had engaged in various activities that Revenue Canada felt constituted political activities.[14] Pursuant to paragraph 168(1)(b) of the Income Tax Act, Revenue Canada[15] gave notice to the organization that it intended to revoke its registration. Under paragraph 168(2)(b), after 30 days from the day of mailing the notice, unless the Federal Court of Appeal extends the

time because the registrant appeals Revenue Canada's decision, Revenue Canada may publish a copy of the notice in the Canada Gazette. In such an event, the registrant's registration will be revoked. In this case, Renaissance International filed a notice of appeal to the Federal Court of Appeal within 30 days and obtained an extension of time for the revocation of its registration.

On the initial hearing before the Federal Court of Appeal, November 17, 1982, the merits of the case were not heard. Instead, Renaissance International argued that the notice sent to it by Revenue Canada expressing the intent to revoke its registration should be set aside. It made this argument on the grounds that Revenue Canada in issuing the letter had failed to comply with the requirements of natural justice. It argued that in exercising its powers under 168 of the Income Tax Act, Revenue Canada was exercising a "quasi-judicial" function. Therefore, in accordance with the rules of natural justice Revenue Canada should have given Renaissance International notice of the case against it and the opportunity of a full hearing at which it could challenge the case against it and adduce evidence of its own. The Federal Court of Appeal upheld this contention.

From this case it is clear that the procedures relating to an appeal from Revenue Canada's registration decisions must be changed to ensure procedural fairness. At the very least a hearing must be held from which a record of the evidence can be prepared. This could be done simply by ensuring that the charity receives notice of the reasons for deregistration and an opportunity to meet the case against it and to present its evidence from the record before a Revenue Canada official. However, a more formal appeal procedure may be desirable.

1 Administrative Appeal

Revenue Canada now provides an administrative appeal procedure for taxpayers who object to their notice of assessments. Presumably, a similar appeal procedure, from which a record could be prepared, could be provided for charities who wished to dispute registration decisions.

A more formal administrative appeal procedure might involve the establishment of a special appeals tribunal. A recommendation such as this was made by the English Expenditure Committee eight years ago.[16] The committee recommended "that a Charities Tribunal composed of persons of distinction should be established specifically to hear appeals against decisions from the Charity Commis-

sioners and from the Inland Revenue" relating to applications for registration. The recommendation was criticized as simply adding another loop for organizations to pass through, and setting up a new body that would likely do the work of the High Court badly.[17] However, a similar recommendation was made a year later in the Goodman Report:[18]

> We consider that appeals from the administrative decisions of the Charity Commissioners should be made to an appellate tribunal only the chairman of which should be legally qualified and before whom appellants might conduct their cases in person or with the help of a friend or legal adviser. There would always be a right of appeal from this tribunal on points of law.

If an administrative appeal tribunal should be interposed between Revenue Canada officials and a court of law, then its nature and composition would have to be determined. Since the tribunal would likely hear only a relatively small number of appeals it would be difficult to structure. One obvious solution would be to simply broaden the jurisdiction of the Tax Review Board to include appeals from registration or revocation decisions. However, this would not satisfy the demand for members on the tribunal with expertise in the nature of the voluntary sector. However, if this point is not considered, it would be a convenient and inexpensive way to set up an appeal process about these administrative decisions.

2 Appeals to the Federal Court, Trial Division

Whether or not a formal administrative appeal procedure is provided, a decision must be made as to whether the appeal to a court of law should be allowed directly to the Federal Court of Appeal or first to the Federal Court Trial Division.

Under the present law, a direct appeal to the Federal Court of Appeal was likely provided for two reasons. First, it undoubtedly reflects the fact that a final decision should be reached on this issue expeditiously. Not only is this important to the charity involved but when Revenue Canada deregisters a charity for engaging in political activities the charity will undoubtedly move under paragraph 168(2)(b) of the Income Tax Act to have deregistration postponed (stayed) until a final decision is reached by the courts. In the meantime the charity may continue raising funds. In Renaissance International a hearing before the Federal Court of Appeal took over two years to be heard. If charities

could appeal first to the Tax Review Board and then up through the court system they could easily stay deregistration five or six years. Second, provision for a direct appeal to the Federal Court of Appeal undoubtedly reflects the fact that the issue of whether an organization has charitable purposes is normally a pure legal question that can be resolved without the necessity of calling evidence. Consequently, in most cases there will be no need for a trial-type hearing.

However, providing for a direct appeal to the Federal Court of Appeal undoubtedly causes difficulties. It is more time consuming, complicated and expensive than obtaining a hearing in a lower court. Furthermore, in some cases of deregistration it might be necessary to call evidence and prepare a record. This was so in Renaissance International. There is no procedure generally by which the Court of Appeal can engage in fact-finding. If, however, there is a formal administrative appeal, or if a record is prepared before Revenue Canada revokes a charities registration, then these objections to a direct appeal to the Federal Court of Appeal are less pressing.

If appeals were taken to the Federal Court Trial Division presumably a special form of summary hearing could be provided in order to expedite hearings and keep expenses to a minimum. In this respect the United States experience is instructive. In the United States, until recently, organizations could not directly appeal a decision by the IRS not to register them as exempt organizations. Judicial review of Service decisions were generally only available when taxes were assessed. Consequently, an organization that wished to contest the denial of exempt status had to find, for example, a donor willing to make a contribution, claim a deduction, and contest the disallowance of the deduction. This failure to provide for direct judicial review of an exemption application was severely criticized by commentators. In 1977 the law was amended to authorize the issuance of declaratory judgments relating to, among other things, the classification of certain exempt organizations.[19] Thus an organization can now obtain judicial review of an IRS failure to act on its application for a tax-exempt ruling, or an unfavorable ruling, or of a revocation of a favorable ruling. The action can be brought in the Tax Court, the District Court for the District of Columbia, or the Court of Claims. The Tax Court has issued detailed rules covering these declaratory judgment actions, which provide that the actions will ordinarily be decided on the basis of the "administrative record" (i.e., the documents and related papers submitted to the IRS).[20] In addition the procedure is streamlined so that appeals can be heard quickly and relatively inexpensively.

FOOTNOTES

1. See generally on the various expenditure and reporting requirements J.J. Coombs, Charities and Charitable Donations: An Evaluation of Canadian Tax Treatment (Don Mills, Ont.: CCH, 1978); A.B.C. Drache, Canadian Tax Treatment of Charities and Charitable Donations 2nd ed. (Toronto: Richard De Boo, 1980).

2. See generally on the role and history of the Charity Commission Spuhler, "The System for Regulation and Assistance of Charities in England and Wales, with Recommendations on the Establishment of a National Commission on Philanthropy in the United States," in Commission on Private Philanthropy and Public Needs, Research Papers (Washington: Department of the Treasury, 1977), vol. 6, p. 3047; Cullity, "Statutory Machinery for Supervising Charities," 1 The Philanthropist (No. 1) 22 (1972); "Memorandum by the Charity Commissions," in Expenditure Committee, 1974-75, Charity Commissioners and Their Accountability, Minutes of Evidence and Proceedings (London: H.M.S.O., 1975), vol. 2 pp. 16-24.

3. See generally Ginsburg, Marks and Wertheim, "Federal Oversight of Private Philanthropy," in National Commission on Philanthropy in the United States, Research Papers (Washington: Department of the Treasury, 1977), vol. 6, p. 2575.

4. (Ottawa: Minister of Supply and Services, 1980), p. 235.

5. Id.

6. See supra note 2.

7. See Cullity, supra note 3.

8. Supra, note 4.

9. Charity Law and Voluntary Organizations (Goodman Report) (London: Bedford Square Press, 1976), p. 67.

10. The Expenditure Committee, Tenth Report: The Charity Commissioners and Their Accountability, 1974-75 (London: H.M.S.O., 1975), para. 95.

11. Supra note 4, p. 234.

12. Subsection 172(3).

13. (1982) C.T.C. 393 (F.C.A.).

14. The facts of the case are described in more detail in Chapter 2 of this paper.

15. The notice was sent by E.A. Chater, Director, Registration Division of the Department of National Revenue, Taxation, acting as the Minister's delegate pursuant to Income Tax Regulation 900(7).

16. See supra note 10, para. 83.

17. Sheridan, "Waiting for Goodman," (1976) Anglo-American Law Review 153, 165-66.

18. See Supra note 9, p. 72.

19. IRC, sec. 7428.

20. Tax Ct.R 217.

CHAPTER 4 FUNDING CITIZEN INTEREST GROUPS

INTRODUCTION

In Chapter 2 the point was made that many of the arguments in favor of allowing charities to engage in political activity confuse the justification traditionally given for government funding of charities with the justification for funding citizen interest groups. As explained in chapters 1 and 2, the chain of reasoning traditionally given justifying the subsidization of charities begins with the premise that they are providing public goods and services that the government itself would otherwise have to provide. On the other hand, the arguments most commonly made for allowing charities to engage in political activities are simply the arguments traditionally given for broadening the base of citizen consultation in the policy formation process; namely, arguments such as the legitimacy of governmental decision-making depends upon public participation, public participation enhances the political viability of government decisions, and, public participation improves the quality of governmental decisions.

Although these arguments might support allowing charities to engage in political activities, they also might support prohibiting charities from engaging in political activities and instead establishing a separate class of organization, perhaps referred to as citizen interest groups, whose purpose would be to engage exclusively in political activities. A number of reasons might lead to this latter position: first, the justifications for allowing charities to engage in political activities extend beyond charities and embrace all citizen interest groups; second, since the present tax deduction for charities was enacted to provide tax assistance to organizations providing public goods and services that the government itself would otherwise have to provide, if they are now to change their role perhaps the characteristics of the tax subsidy should change (that is to say, perhaps different kinds of tax deductions or other funding devices ought to apply to traditional charities than apply to citizen interest groups, see below for illustrations); and third, for the reasons mentioned in Chapter 2 it might not be in the long-term best interest of the voluntary sector to have both traditional charitable activities and political activities undertaken by the same organizations.

To assist in the evaluation of whether charities should be allowed to engage in an unlimited amount of political activities or their political activities should be limited and a separate kind of organization - citizen interest groups - established, the case for the subsidization of citizen interest groups will be briefly reviewed. These options are, of course, not necessarily alternatives. If charities are permitted to engage in political

activities the need for providing a matching grant scheme for the subsidization of citizen interest groups is substantially weakened, since most citizen interest groups could qualify as charities. However, if such a scheme is to be more generous than the present tax deduction for charities or if the amount of political activities that charities could engage in were limited, then a separate matching grant scheme for public interest groups might still be needed. Conversely, if charities are prohibited from engaging in political activities, the case for subsidizing citizen interest groups might be treated as a separate issue. However, if the prohibition on charities were strictly enforced, which at present it is not, there would be considerable pressure to provide some form of matching grant scheme for organizations engaged in political activity.

The purpose of this review of funding citizen interest groups is not to explore the issue in depth, but simply to clarify the issues and interests at stake in determining whether charities should be allowed to engage in political activities.

In recent years the issue of funding citizen interest groups has been thoroughly canvassed in the context of reforming the regulatory process, and a number of recommendations have been made. The issues and problems raised in this context are similar to the issues and problems raised in the larger context of public participation in the policy formulation process.

The Parliamentary Task Force on Regulatory Reform (the Peterson Committee) recommended that:

> Government conduct a study of the most appropriate means of funding public interest groups, including the use of tax incentives, and other methods of increasing financial support for those groups.[1]

The Economic Council of Canada in its report Reforming Regulation recommended:

> That governments, through the tax system, encourage small, individual contributions to public interest groups and, in particular, allow public interest groups to engage in a small amount of political activity without forfeiting their status as charitable organizations.[2]

Although the literature on funding citizen interest groups is voluminous,[3] the most comprehensive and analytical study is a working paper prepared for the Economic Council of Canada by Kenneth G. Englehart and Michael J. Trebilcock, "Public Participation in the Regulatory Process: The Issue of Funding."[4] The summary below draws heavily upon their work.[5]

The case for government subsidization of citizen interest groups rests upon the premise that their intervention in the policy formulation process is, in the jargon of economists, a public good. These groups, as opposed to groups representing private interests, have one or more of the following characteristics which make it improbable that they would organize without government assistance: (1) Their members cannot be readily organized because they are institutionalized, are not readily identifiable, or because the transaction costs of organizing them are high (because, for example, of geographical boundaries). (2) Their members lack the financial resources to support their interest group activities; for example, the unemployed and welfare recipients. (3) Their members individually have only a small or non-economic interest in particular issues and therefore they are unwilling to contribute substantial amounts to the group (this, of course, is the traditional free-ride problem); for example, consumer, civil liberties and environmental groups. (4) Their members are small in numbers; for example, the handicapped.

There are of course a broad range of instruments available to the government for funding citizen interest groups. But, a number of reasons have been suggested as to why a fiscal incentive, such as a tax credit, is a better instrument than some form of direct government funding: since the goal of the policy is to make the public voice more effective in the policy formation process it makes sense to give the public control over which citizen interest groups receive subsidization, this is the effect of a tax credit; the need for citizen interest groups to attract funds from the public would be an incentive for interest groups to educate the public about the issues with which they are concerned, to keep them informed about recent developments, and generally to be accountable to their constituents; and by avoiding direct government subsidization any implicit control the government might have over the activities of the groups is removed.

Because their functions are different the characteristics of the tax credit for citizen interest groups might be quite different from the characteristics of a tax credit for charities. The following points are illustrative of what some of these differences might be.

(i) Definition. Not only would the definition of a citizen interest group obviously be much different from the traditional definition of a charity, but it is difficult to see how 'charity' could be defined to embrace all citizen interest groups. Many groups engaged in lobbying activities would not fit within any of the traditional charitable categories. In defining the nature of organizations that qualify as citizen interest groups, it would be important to ensure that subjective standards were not used that would make them subject to discretionary review by a government agency. One suggested approach is to simply allow all organizations that spend 80 percent (for example) of their income on representational expenses to qualify.

(ii) Self-Interest Lobbying. A number of steps could be taken to ensure that citizen interest groups did not simply represent the self-interest of a small number of people. (a) Naturally, a general rule prohibiting such organizations from being organized and operated for the benefit of private interests could be provided. This is a rule that now applies to charities generally and is enforced in that context. (b) It could be provided that qualified public interest groups be maintained structurally independent of any other organization, such as corporations. (c) By restricting the tax credit to a small amount annually ($100 or $200) the qualifying organization could be prevented from becoming dominated by a single source of funds.

(iii) Contributors. Since the purpose of the scheme is to finance otherwise unrepresented interests there is probably no reason why corporations or unions, for example, should be given the tax credit.

(iv) Amount of Credit. To ensure that the group was accountable to the interest of its constituents and to control the revenue cost, the percentage of tax credit might be different from that afforded to donors to charities.

FOOTNOTES

1. Special Committee on Regulatory Reform, Report (Ottawa: Minister of Supply and Services, 1980), p. 33.

2. (Ottawa: Minister of Supply and Services, 1981), p. 136.

3. See D. Fox, Public Participation in the Administrative Process, a study paper for the Law Reform Commission (Ottawa: Minister of Supply and Services, 1979), and literature cited therein.

4. Working Paper No. 17, February, 1981.

5. See also Trebilcock and Engelhart, "A Tax Credit for Public Interest Groups," 2 Canadian Taxation 29 (1981).